

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Part 1 of the)	WT Docket No. 97-82
Commission's Rules --)	
Competitive Bidding Proceeding,)	

**ORDER, MEMORANDUM OPINION and ORDER
and NOTICE OF PROPOSED RULE MAKING**

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I. INTRODUCTION

1.. In this *Order and Memorandum Opinion and Order (Order)* and *Notice of Proposed Rule Making (Notice)*, we undertake a comprehensive examination of our general competitive bidding rules for all auctionable services. In the *Second Report and Order* in PP Docket No. 93-253, we stated that we would "issue further Reports and Orders . . . to adopt auction rules for each auctionable service or class of service,"¹ and we identified criteria that would govern our choice of service-specific auction rules and procedures, which may be found in Subpart Q of Part 1 of our rules.² Since adoption of the *Competitive Bidding Second Report and Order*, the Commission has completed over ten auctions, adopting service-specific competitive bidding rules for each one.³ Based on the experience we have gained from the completed auctions and the feedback we have received from bidders, we believe that our general auction rules should be streamlined or amended so as to make our licensing process more efficient.

1. In this *Order*, we amend Subpart Q of Part 1 of the Commission's rules to reflect procedural changes that we believe will benefit bidders and the auction process generally and, in so doing, address some issues raised in petitions for reconsideration of our *Competitive Bidding Fifth Memorandum Opinion and Order*.⁴ In the *Notice*, we propose additional changes to our general competitive bidding rules that are intended to simplify our regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants while also giving them more flexibility.

II. EXECUTIVE SUMMARY

2. Many of the rule changes in the *Order* mirror provisions adopted in certain service-specific rules. It also addresses issues raised in some of the petitions for reconsideration and *ex parte* communications concerning financial provisions adopted in the *Competitive Bidding Fifth Memorandum Opinion and Order*. The *Order* also clarifies the extent of authority delegated to the Chief of the Wireless Telecommunications Bureau to implement regulations pertaining to competitive bidding. In addition, the *Order* modifies the short-form application (FCC Form 175)

¹ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2360, ¶ 68 (1994) ("*Competitive Bidding Second Report and Order*"), *recon.*, *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*")

² 47 C.F.R. §§ 1.2101 *et seq.*

³ See, e.g., 47 C.F.R. §§ 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. §§ 24.701-720 (broadband PCS); 47 C.F.R. §§ 90.901-90.913 (Specialized Mobile Radio (SMR)); 47 C.F.R. § 95.816 (Interactive Video and Data Service (IVDS)); 47 C.F.R. §§ 100.71-100.80 (Direct Broadcast Satellite (DBS)); 47 C.F.R. §§ 21.921-21.961 (Multipoint Distribution Service (MDS)).

⁴ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 10 FCC Rcd 403 (1994), *erratum*, 60 Fed. Reg. 5333 (Jan. 27, 1995) (*Competitive Bidding Fifth Memorandum Opinion and Order*).

to include a certification indicating that an applicant seeking installment payment eligibility is not in default on any payment for Commission licenses or delinquent on any non-tax debt owed to any federal agency.

3. In the past, we have tailored auction procedures for different services as we gained experience with the process. As a result, certain procedures vary across auctionable services. In this proceeding, we seek to establish a uniform set of provisions that would incorporate our experience to date and allow us to conduct future auctions in a more consistent, efficient, and effective manner. More specifically, the *Notice* seeks comment on the following issues:

- Whether to adopt, for all auctions in which special provisions are made for "designated entities"⁵ of a certain business size, a definition of "gross revenues" and a uniform approach for financial size attribution, using an affiliate and controlling interest attribution standard; and whether to change our definition of affiliate.
- Whether to modify our installment payment rule, Section 1.2110(e), for future auctions in the following respect: (1) establish a maximum interest-only period of two years, while retaining the authority to increase this period on a service specific basis; (2) provide for slightly higher interest rates; (3) set the interest rate for such payment plans on the date that the Public Notice is issued announcing the close of the auction; and (4) make other changes in our rules regarding late payments, default payments, and grace periods.
- Whether to adopt "schedules" of installment payment plans and bidding credits for which designated entities qualify (in service-specific rule making proceedings we would continue to establish the appropriate size standards for each auctionable service).
- Whether to modify the unjust enrichment rule, Section 1.2111(c), which governs the payment of unpaid principal and accrued interest by licensees utilizing installment payments and seeking to transfer or assign their licenses, to conform with the broadband PCS rules.⁶
- Whether to amend Sections 1.2105(a) and 1.2107(c) to require that all short-form and long-form applications be filed electronically beginning January 1, 1998.
- Whether to amend Section 1.2105(b)(2) to provide a uniform definition of major amendments to FCC Form 175.
- Whether to adopt general ownership disclosure requirements and allow auction applicants

⁵ See 47 C.F.R. § 24.720(f). The Commission's rules previously defined designated entities as small businesses, businesses owned by women or members of minority groups, and rural telephone companies. 47 C.F.R. § 1.2110(a).

⁶ See 47 C.F.R. § 24.716(c).

to submit ownership information for one auction that would then be stored in a central database and updated as necessary for subsequent auctions rather than requiring resubmission of ownership information on each short-form and long-form application.

- Whether to modify the practice of refunding upfront payments before the end of the auction to bidders that lose eligibility to continue in the auction.
- Whether to require that winning bidders against whom petitions to deny are filed make their second down payments at the same time as those against whom no petitions are filed.
- Whether to amend Section 1.2104(g) to apply uniform default rules to all auctionable services and all auction designs.
- Whether to allow for "real time" bidding in simultaneous multiple round auctions.
- Whether to amend Section 1.2104 to specify that the Commission may establish minimum opening bids, rather than only suggested minimum opening bids.
- Whether to adopt for all auctionable services our broadband PCS rules governing bid withdrawal payments in the event of erroneous bids.
- Whether to retain or modify Section 1.2109(b), which concerns the Commission's options in the event a winning bidder defaults on its down payment.
- Whether to modify the anti-collusion rules set forth in Section 1.2105(c)(1) to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants.
- Whether to permit all auction winners to begin construction of their systems, at their own risk, upon issuance of a Public Notice announcing auction winners.

III. ORDER and MEMORANDUM OPINION AND ORDER

4. This *Order* amends Subpart Q of Part 1 of the Commission's rules to reflect certain clarifications and procedural changes that we have found to be warranted based on our experience in conducting auctions. The amendments adopted herein pertain to agency procedure and practice. Consequently, the requirement of notice and comment rule making contained in 5 U.S.C. § 553(b) and the effective date provisions of 5 U.S.C. § 553(d) do not apply.⁷ Authority for the amendments adopted herein is contained in Sections 4(i), 5(b), 5(c)(1), 303(r), 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(b), 155(c)(1), 303(r) and

⁷ See *JEM Broadcasting v. FCC*, 22 F.3d 320, 326-28 (D.C. Cir. 1994).

309(j)). These amendments are as follows:

5. Auction designs and procedures. In Section 1.2103(a) of our rules, we list the types of auction designs from which we may choose to award licenses for services or classes of services subject to competitive bidding: (1) single round sealed bid auctions (either sequential or simultaneous); (2) sequential oral auctions; and (3) simultaneous multiple round auctions.⁸ Based on our experience in conducting auctions to date, we believe that we should modify the menu of auction design options from which we may choose to better reflect the range of auction design methodologies that are available. Thus, we are amending Section 1.2103(a) of our rules to specify the auction designs more explicitly and to include the methods of submitting bids from which the Commission will generally choose. Specifically, the menu of competitive bidding designs provided in Section 1.2103(a) is revised to include: (1) simultaneous multiple round auctions, using remote and/or on-site electronic bidding⁹; (2) sequential multiple round auctions, using either oral ascending, remote or on-site electronic bidding¹⁰; and (3) sequential or simultaneous single round auctions, using either remote and/or on-site electronic bidding, or sealed bids.¹¹ We also note that under Section 309(j) of the Communications Act, as amended, we continue to have the authority to design and test other auction methodologies such as combinatorial bidding.¹²

6. Timing of auctions. We believe that the public interest would be served by establishing regular quarterly auctions for defaulted licenses or unsold licenses that were previously auctioned and for which there are mutually exclusive applications, services with a small number of licenses, and services in which licenses are expected to have low values. Regular quarterly auctions will ensure the timely award of these licenses by holding a number of small separate auctions at the same time, thus reducing preparation time. In addition, quarterly auctions of defaulted or unsold licenses, in particular, will provide potential bidders with clear guidance regarding when such licenses will be available for bidding by providing a more definite timetable for offering them. We therefore will conduct quarterly auctions in the future, while retaining the discretion to decide in

⁸ 47 C.F.R. § 1.2103(a).

⁹ In a simultaneous multiple round auction, groups of interdependent licenses are auctioned in a single auction. Bidders bid through a series of rounds and information on the winners of each round is transmitted to bidders, who, in the next round, may attempt to top the bids submitted in the previous round. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2363, ¶ 87.

¹⁰ A sequential multiple round auction differs from a simultaneous multiple round auction in that each license is auctioned individually, with the bidding ending on one license before bids are accepted for another license. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2363, ¶ 86.

¹¹ In sequential or simultaneous single round auctions, licenses are auctioned either one at a time or in groups. Bidders submit a single bid for each license; the highest bidder is awarded the license. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2362, ¶ 80.

¹² 47 U.S.C. § 309(j)(3). Combinatorial bid techniques permit bidding for multiple licenses as all or nothing packages. They may be implemented with either simultaneous or sequential auction designs. If a package bid were to exceed the sum of the highest bids for the licenses that comprise the package (individually or in smaller packages), then the package bid wins. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2365-66, ¶ 98-104.

any quarter that an auction will not be held.

7. Application procedures. Section 1.2105(a) of our rules is amended to indicate that an applicant's signature on FCC Form 175 or its electronic submission of this form will serve to certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency. In the *Competitive Bidding Second Report and Order*, we decided that we should require sufficient information on the short-form application to make a determination that "the application is not in violation of Commission rules and that applications not meeting those requirements may be dismissed prior to the competitive bidding."¹³ Part of this documentation includes certification that the bidder has the legal, technical, financial, and other qualifications to bid in the auction. The certification we henceforth will require regarding defaulted licenses and delinquent debts to federal agencies will afford additional assurance that the applicant will be able to meet its future obligations by indicating whether it may later be subject to a monetary judgment or collection procedures that may impair its ability to provide service. Bidders who cannot make this certification may be ineligible for installment payment plans.¹⁴

8. Payment procedures. Section 1.2106(b) of our rules addresses the submission of upfront payments by bidders in an auction. Section 1.2107(b) of our rules addresses submission of down payments by high bidders at the end of the auction. Section 1.2110(e)(1) of our rules addresses down payments made by entities eligible for installment payments. These rules currently allow for submission of payments to the Commission by either wire transfer or cashier's check. Our experience has shown that verification of payments remitted to us by cashier's check is difficult for the FCC to track and reconcile rapidly prior to our auction deadlines. With respect to upfront payments, permitting submission of payment by cashier's check requires the dedication of significant processing time prior to the start of an auction. Delays in verification of down payments slows both the ultimate award of licenses and the eventual delivery of service to the public. Thus, we are amending these rules to require that bidders make their upfront payments and down payments to the Commission by wire transfer, thereby eliminating the option of making payments by cashier's check. We believe that this change will benefit bidders by streamlining administration of the auctions and the ultimate award of licenses. A requirement that bidders remit upfront payments and down payments by wire transfer will result in minimal, if any, extra cost to auction applicants, and any such cost will be far outweighed by the benefit of speeding the auction process and the award of licenses through more rapid and accurate verification of payments. We note that wire transfers are already commonly used by most of our bidders and that this service is widely available to businesses and individuals functioning in the marketplace.

9. To implement Section 1.2110(e)(3) of our rules, the Wireless Telecommunications

¹³ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375, ¶ 161.

¹⁴ Under the Debt Collection Improvement Act ("DCIA"), no person may obtain any federal financial assistance if the person has an outstanding debt with any federal agency which is in a delinquent status. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B.

Bureau (Bureau) has required winning bidders to execute a promissory note and security agreement to participate in installment payment plans. For example, these procedures were used in licensing the Multipoint Distribution Service ("MDS"), 900 MHz Specialized Mobile Radio ("SMR") service, and broadband PCS C block.¹⁵ Consistent with normal commercial and government lending practices,¹⁶ these lending documents memorialize the terms of the installment payment plan and specify government and licensee rights and remedies under the installment payment plan. Section 1.2110(e)(3) is amended to codify this procedure under which all applicants eligible to utilize installment payments execute a promissory note and security agreement as a condition of participating in any installment payment plan that is offered by the FCC.

10. On a related matter, bidders and financial institutions have indicated that our auction rules may prevent commercial lenders and equipment vendors from adequately protecting the loans they make or the credit they extend to auction winners who avail themselves of the installment payment plans.¹⁷ Specifically, parties have requested that we provide automatic grace periods in the event of default under the installment payment plan;¹⁸ implement installment payment plan terms consisting of interest-only payments for the entire term of the license, with a balloon payment at the end of the license term;¹⁹ enter into intercreditor or collateral sharing agreements with other creditors of licensees and/or make the auction payment to the Commission subordinate to the debt of the licensee's financial lenders;²⁰ not cancel licenses where the licensees are in default of their installment payments and instead allow the license to remain part of the

¹⁵ See FCC Announces Grant of 900 MHz Specialized Mobile Radio Licenses, *Public Notice* No. 96-1282 (Aug. 12, 1996); Mass Media Bureau Prepared to Issue Multipoint Distribution Service BTA Authorizations, *Public Notice* No. D-868 (Aug. 2, 1996); FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas, *Public Notice* No. 96-716 (May 8, 1996).

¹⁶ See, e.g., Reiley, Eldon H., *Guidebook to Security Interests in Personal Property* (1989), § 4-17.

¹⁷ We received the following submissions addressing this topic on reconsideration of the *Competitive Bidding Fifth Memorandum Opinion and Order* in Docket No. 93-253: (1) Request to the FCC to Reconsider, on its Own Motion, Certain Aspects of the PCS Designated Entity Rules filed by National Telecom, Inc. ("NatTel") (December 15, 1994); (2) Petition for Limited Reconsideration of NationsBank (December 19, 1994); (3) Petition for Reconsideration of NatTel (January 6, 1995); (4) *Ex Parte* Comments of NTFC Capital Corporation ("NTFC") (February 9, 1995); (5) *Ex Parte* Comments of Mellon Bank ("Mellon") (February 24, 1995); (6) *Ex Parte* Comments of First National Bank of Maryland ("FNBMD") (March 3, 1995); (7) *Ex Parte* Sureply of NatTel (March 9, 1995); (8) *Ex Parte* Comments of NationsBank (April 19, 1995); and (9) *Ex Parte* Comments of Toronto-Dominion Bank ("TDB") (May 23, 1995). Since these parties raise issues that apply to all auctionable services that utilize installment payment plans, we choose to resolve these petitions and address the *ex parte* filings in the instant *Order* under docket number WT 97-82. Several other Petitions for Reconsideration of the *Competitive Bidding Fifth Memorandum Opinion and Order* address issues specific to Broadband PCS and will be considered in a separate *Order*. Any filings in response to our resolution of these petitions should be filed under the new docket number.

¹⁸ NatTel Request at 5 (automatic 90 day grace period); NatTel Petition at 7 (same); TDB Comments at 2-3 (365 day "standstill" period).

¹⁹ NatTel Request at 4, 5; NatTel Petition at 5, 7; TDB Comments at 3.

²⁰ NationsBank Petition at 9; NatTel Request at 3, 5; NatTel Petition at 3-4, 6; NTFC Comments at 8-10; Mellon Bank Comments at 3; NatTel Surreply at 5; TDB Comments at 2.

assets to be sold as a "going concern" in a pre-bankruptcy workout;²¹ and ease license transfer restrictions to allow for voluntary transfer of licenses to non-designated entities in cases of financial distress.²² In the *Notice of Proposed Rule Making* portion of this document, we seek comment on changes to our Part 1 rules with regard to grace periods (*see infra* Section IV.D.4.b) and installment payment plan terms (*see infra* Section IV.B.5), and will incorporate these parties' suggestions into the record generated by the *Notice*. With regard to the remaining concerns, we believe that our auction rules balance in a reasonable, commercial fashion the government's interest in protecting the public's rights to receive full payment for the spectrum bid upon, while granting qualifying entities the ability to pay for licenses through installment payments more generous in terms than any type of loan otherwise available in the marketplace. Our rules and policies are designed to promote private market solutions to capital problems (*i.e.*, licensees and lenders working together toward a satisfactory resolution), and therefore provide adequate mechanisms for entities to attain sufficient debt financing under general market conditions.²³ To the extent that the petitioning parties seek relief outside of what is already provided by the Commission's rules, these requests are denied for the following reasons.

11. First, under current Commission policy, lenders may not be granted direct security interests in FCC licenses.²⁴ In the auctions context, the Commission has established a first security interest in licenses being financed by it through installment payment plans. Accordingly, Section 1.2110(e)(4)(iii) of our rules provides for cancellation of a license upon default of installment payment obligations. We understand that it is customary in commercial financing to grant lenders security interests in the *proceeds* of the sale of FCC licenses and Section 1.2110(e) is not intended to impede or adversely affect a licensee's ability to obtain bank or other financing. Accordingly, debtors may grant to other parties a subordinated security interest in the proceeds of an authorized assignment or transfer of the license to a third party, provided however that any such security interest shall be subordinated to and in no way inconsistent with the Commission's security interest in the license.²⁵

12. We note, however, that reclaiming a license pursuant to Section 1.2110(e)(4)(iii) is the Commission's remedy of last resort after conclusion of the regulatory processes set forth in

²¹ NationsBank Petition at 7-8; NTFC Comments at 3-4, 6-8; Mellon Bank Comments at 2-3; FNBM Comments at 1-2; NationsBank Comments at 6.

²² NationsBank Petition at 4-7; NTFC Comments at 5-6; Mellon Bank Comments at 1-2; FNBM Comments at 1; NatTel Surreply at 2-4; NationsBank Comments at 4-5; TDB Comments at 2.

²³ See Letter from William E. Kennard and Michele C. Farquhar to Leonard J. Kennedy and Richard J. Denning, DA 96-2123 (December 17, 1996).

²⁴ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389-2390, n. 177, ¶ 233, citing *Radio KDAN, Inc.*, 11 FCC 2d 934 (1968), *recon. denied*, 13 RR 2d 100 (1968), *aff'd on other grounds sub nom Hanson v. FCC*, 413 F.2d 374 (D.C. Cir. 1969), and *Kirk v. Merkley*, 94 FCC 2d 829 (1983).

²⁵ See Letter from William E. Kennard and Michele C. Farquhar to Leonard J. Kennedy and Richard J. Denning, at p.1.

Section 1.2110(e).²⁶ The Commission firmly believes that "[m]arket-oriented solutions to problems of financial distress will often be preferable to the FCC reclaiming and reauctioning licenses."²⁷ This is particularly true when reclaiming a license would deprive or interrupt service to ongoing end users. Lenders and licensees are free to agree contractually to their own terms regarding situations where the licensee fails to make timely payments under the Commission's installment payment program. As long as there is no transfer of control, we would not become involved in the particulars of a voluntary workout arrangement between licensees and third-party lenders, including lenders' assumption of the licensee's payments to the Commission.²⁸ Our policies also provide that in the event an installment payment licensee is in default to a third-party lender such that the lender accelerates its loan, the lender can seek a new buyer to replace the defaulted licensee, subject to Commission approval of the transfer.²⁹ While certain FCC rules contain restrictions on the transfer of licenses acquired through the use of designated entity provisions for the statutory purposes of assuring license dissemination among a wide variety of applicants including designated entities,³⁰ licensees may request a waiver of such rules. For example, upon a showing, supported by an affidavit, that the licensee is in financial distress, the Commission will consider granting a waiver of the transfer restrictions provided that such transaction is otherwise in the public interest.³¹ Under these circumstances, if a license is transferred to an entity that would not qualify for designated entity provisions, or that would qualify for less favorable designated entity provisions, the unjust enrichment provisions set forth in Section 1.2111 of the Commission's rules or service-specific rules would apply.³² In summary, commercial lenders and equipment vendors have adequate assurances from the Commission that in most situations of financial distress, licenses can be transferred as a "going concern," subject, of course, to the rights of the Commission to the payments of obligations created under the Commission's rules (including unjust enrichment payments), the license conditions, the promissory

²⁶ See *infra* ¶ 78 where we seek comment on appropriate default remedies.

²⁷ Amendment of Parts 20 and 24 of the Commission's Rules, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7864, ¶ 85 (1996) (*D, E, F Block Report and Order*).

²⁸ See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 471.

²⁹ See *Public Notice*, Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, at p.6 (June 8, 1995) (*C Block Q&A*); See also *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 471, ¶ 134.

³⁰ See, e.g., 47 C.F.R. § 24.839(d) (as amended by the *D, E, F Block Report and Order*, 11 FCC Rcd at 7863-64, which eliminated the 3-year absolute bar to transfer of entrepreneurs' block licenses and established a 5-year period in which entrepreneurs' block licenses could be assigned or transferred only to qualifying entrepreneurs).

³¹ See, e.g., *C Block Q&A* at p.6; *W.A.V., Inc.*, 8 FCC Rcd 3133 (MMB 1993); *King Kable, Inc.*, 8 FCC Rcd 1515 (MMB 1993); *Turner Communications Corp.*, 33 F.C.C.2d 843 (1972); *Voice of the Caverns, Inc.*, 4 F.C.C.2d 946, 948 n.5 (1966).

³² See, e.g., *C Block Q&A* at p.6. The unjust enrichment rule generally requires repayment to the government of bidding credits or full payment of principal subject to installment payments when licenses are transferred to entities ineligible for these provisions.

note, and the security agreement.³³

13. Payment Dates. Sections 1.2107(b), 1.2109(a), and 1.2110(e) of our rules identify the dates by which each winning bidder is required to make the down payment and final payment on a license. Under these rules, a winning bidder must make its down payment within five (5) business days after being notified that it is a high bidder on a license, and make payment of the balance of its winning bid within five (5) business days following the award of the license.³⁴ We amend these rules to change the applicable payment period from five (5) business days to ten (10) business days and, consistent with our SMR rules, to change the event triggering the final payment obligation (or in the case of entities eligible for installment payments, the second down payment obligation) from the award of the license to the issuance of a public notice indicating that the Commission is prepared to award the license or authorization.³⁵ These changes will facilitate a more orderly licensing process and ensure that successful bidders have adequate time to fulfill their payment obligations. Section 1.2109(b) of our rules, which addresses the circumstances in which a bidder will be deemed to have defaulted on its down payment obligations, is also amended to specify ten (10) business days instead of five (5) business days.³⁶

14. Definition of "minority". Section 1.2110(b)(2) of our rules defines the term "minority" as "individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction."³⁷ In the *Competitive Bidding Fifth Memorandum Opinion and Order*, we revised this definition, for purposes of the broadband PCS rules, to conform with the definition of "minority" used in other contexts.³⁸ At that time, we noted that the same definitional correction would be made to Section 1.2110(b)(2).³⁹ To date, we have not made such a correction. Thus, we now revise the definition of "minority" in Section

³³ See Letter from William E. Kennard and Michele C. Farquhar to Leonard J. Kennedy and Richard J. Denning, DA 96-2123, at p.3 (December 17, 1996).

³⁴ 47 C.F.R. §§ 1.2107(b), 1.2109(a) and 1.2110(e)(2). Section 1.2107(b) also specifies reduced payment obligations for winning bidders that are qualified as designated entities eligible for installment payments under Section 1.2110(d).

³⁵ See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, ¶ 116 (1995) ("*Competitive Bidding Second Order on Recon./Seventh Report and Order*").

³⁶ We note that in the *Notice of Proposed Rule Making*, we seek comment on possible modifications to the provision in Section 1.2109(b) that addresses the Commission's discretion to offer defaulted licenses to other bidders in the original auction. See *infra* at ¶¶ 95-97.

³⁷ 47 C.F.R. § 1.2110(b)(2).

³⁸ *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 432 ¶ 52 (1994) (revising 47 C.F.R. § 24.720(i) to conform with the definition of "minority" found at, *inter alia*, 47 U.S.C. § 309(i)(3)(c)(ii) and 47 C.F.R. § 1.1621(b)). See also *Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466, 1473 (1979); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977).

³⁹ See *id.* at n.123.

1.2110(b)(2) to read as follows: "Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders." With regard to the meaning of particular categories in the definition, we shall use the same category descriptions the Commission has relied on in other contexts.⁴⁰

15. Delegated authority. We also clarify that pursuant to Section 0.131 of our rules, the Chief, Wireless Telecommunications Bureau, has delegated authority to implement all of the Commission's rules pertaining to auctions procedures.⁴¹ This includes the authority to choose competitive bidding designs and methodologies, such as simultaneous multiple round auctions or oral outcry auctions and remote electronic bidding or on-site bidding; conduct auctions; administer application, payment, license grant and denial procedures; and determine upfront and down payment amounts. We note that the Bureau should, to the extent possible, carry out its duties under this authority through the use of orders, public notices, bidder packages, notices disseminated through the electronic bidding system, and by other reasonable means and with the benefit of public comment where appropriate.⁴² We further note that such Bureau actions are subject to review by the full Commission.⁴³

IV. NOTICE OF PROPOSED RULE MAKING

16. We seek comment on a variety of proposals and tentative conclusions set forth below. In addition, Attachment A consists of a list of the competitive bidding provisions that have been adopted in specific services but not included in our Part 1 rules. We seek comment on whether these provisions should be included in the Part 1 rules and, if so, whether any amendments to these provisions are needed in light of our proposal, discussed below, to apply these general competitive bidding rules to future auctions.

A. Applicability of General Competitive Bidding Rules

17. As we have gained experience in conducting auctions, we have found that much of the auction process can be standardized and that establishing service-specific rules for many aspects of the competitive bidding process is unnecessary. We also find that conducting rule makings for each individual service slows down the delivery of service to the public because it may result in regulatory delays before the licensing process begins. Thus, we propose that, to the extent possible, all future auctions be governed by the general competitive bidding rules adopted

⁴⁰ See *id.* at 433.

⁴¹ 47 C.F.R. § 0.131.

⁴² See, e.g., *Public Notice*, FCC Issues Procedures, Terms and Conditions for January 13, 1997 Auction of Cellular Unserved Phase I and Phase II Service Areas, DA 96-1850 (Nov. 8, 1996); *Public Notice*, FCC Announces Auction of 900 Mhz Specialized Mobile Radio Service, No. AUC-95-07 (Sept. 15, 1995); *Public Notice*, FCC Announces Auction of Multipoint Distribution Service, No. AUC-95-06 (Sept. 5, 1995).

⁴³ See 47 C.F.R. §§ 1.115, 1.117.

in this proceeding. We envision that only a limited number of competitive bidding regulations would need to be adopted on a service-specific basis. We seek comment on whether the rules adopted in this proceeding should supersede all existing, service-specific competitive bidding rules for future auctions. We propose that this action would affect all services that are subject to pending proceedings⁴⁴ and any services that have existing competitive bidding rules that might apply to licenses that have not yet been auctioned or that must be reaucted. We seek comment on whether, alternatively, we should phase in the applicability of the revised general competitive bidding rules at a future date, such that, at a minimum, initial auctions may be completed under the existing service-specific rules. In the event we decide not to apply the revised Part 1 rules to supersede existing service-specific auction rules, should we nonetheless subject licenses that are reaucted (due to defaults or if no winning bidder is otherwise declared) to these revised Part 1 general competitive bidding rules? To the extent that commenters believe that service-specific rules should be maintained, they should explain which ones and why.

B. Rules Governing Designated Entities

1. Small Business Size Standards

18. Background. Section 1.2110(b)(1) of our rules states that the Commission "will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service."⁴⁵ To date, we have defined five different categories of businesses which qualify for special provisions such as bidding credits and installment payment plans. Thus, in various services we have adopted small business definitions based on gross revenues ceilings of \$3 million, \$15 million, and \$40 million.⁴⁶ We also established a \$75 million gross revenues standard for determining eligibility for installment payment plans in the broadband PCS C and F block auctions.⁴⁷ Finally, we established a \$125 million gross revenues threshold for determining entrepreneurs' block eligibility in the broadband PCS C and F block auctions.⁴⁸

⁴⁴ See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding - *Tenth Report and Order*, FCC 96-447, PP Docket No. 93-253 (November 21, 1996)(Interactive Video and Data Service (IVDS)); Further Development of Paging Systems, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 61 Fed. Reg. 34,375 (Jul. 2, 1996); *Fourth Notice of Proposed Rule Making*, 61 Fed. Reg. 39,425 (Local Multipoint Distribution Service (LMDS)); *Proposed Rule*, 61 Fed. Reg. 2465 (Jan. 26, 1996) (39 GHz); *Proposed Rule*, 61 Fed. Reg. 6212 (Feb. 16, 1996) (800 MHz SMR).

⁴⁵ 47 C.F.R. § 1.2110(b)(1).

⁴⁶ 47 C.F.R. § 90.814(b)(1)(i) (\$3 and \$5 million definition of small business in 800 MHz and 900 MHz SMR); 47 C.F.R. § 24.720(b)(2) (\$15 million definition of small business in broadband PCS F block); 47 C.F.R. § 24.720(b)(1) (\$40 million definition of small business in broadband PCS for C and F blocks); 47 C.F.R. § 21.961(b)(1) (\$40 million definition of small business in MDS).

⁴⁷ 47 C.F.R. § 24.711(b)(1).

⁴⁸ 47 C.F.R. § 24.709(a)(1).

19. Discussion. We propose to continue our practice of soliciting comment in service-specific rule making proceedings on the appropriate small business size standard, or tiered standards, for each auctionable service. In such rule makings, we would, as we have done in the past and pursuant to Section 1.2110(b)(1), take into consideration the characteristics and capital requirements of each service. We would in all cases, however, for purposes of future auctions, express the definition of small business purely in terms of gross revenues.⁴⁹ We further propose that, once the small business definition for any particular service is adopted, the special provisions for which such businesses qualify would be determined by schedules set forth in the general competitive bidding rules.⁵⁰ We seek comment on this proposal.

20. We note that some of our eligibility requirements are defined in terms of gross revenues of "less than" a certain amount, rather than "not exceeding" a certain amount. We tentatively conclude that a uniform method of measurement is preferable because it is more equitable and administratively simpler. We therefore propose that when we adopt size standards, those standards should be expressed so as to require businesses to have gross revenues "not to exceed" particular amounts, and that all standards already adopted be modified to conform to this method of defining size.⁵¹ We seek comment on this proposal. We also propose to base all small business size standards on the applicant's average gross revenues over the preceding three years, consistent with the Small Business Act, 15 U.S.C. § 632(a). We seek comment on this proposal.

2. Definition of Gross Revenues

21. Background. In some services, eligibility criteria are based on the size of the entity as measured by its gross revenues. For instance, eligibility for small business provisions such as bidding credits and installment payments has been determined based on average gross revenues.⁵² Each of our revenue-based size standards has required applicants to calculate their average gross revenues over a certain number of years. In adopting these standards, we reasoned that a gross revenues test was consistent with the approach taken by the U.S. Small Business Administration ("SBA").⁵³ Currently, however, our general competitive bidding rules do not define the terms "gross revenues," nor do they indicate how gross revenues should be calculated for purposes of size standards.

⁴⁹ We note that the Commission is considering issues surrounding small businesses' participation in the communications industry in a pending proceeding on market entry barriers for small businesses. See Section 257 Proceeding to Identify and eliminate Market Entry Barriers for Small Businesses, *Notice of Inquiry*, GN Docket No. 96-113, FCC 96-216 (rel. May 21, 1996).

⁵⁰ See *infra* at Sections IV.B.5 and 6.

⁵¹ Thus, for example, the eligibility rule for the broadband PCS C and F blocks would be modified to read "gross revenues *not to exceed* \$125 million." See 47 C.F.R. § 24.709.

⁵² See, e.g., 47 C.F.R. §24.320(b)(1)(i).

⁵³ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5532, ¶¶ 158, 201-207.

22. Discussion. Although our general competitive bidding rules do not define "gross revenues," we have adopted definitions in various services which are generally the same, but contain some distinction regarding use of audited and unaudited financial statements. For instance, our broadband PCS rules define gross revenues as follows:

all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.⁵⁴

In order to promote uniformity of regulations, we propose to use this definition for all size-based determinations for all auctionable services, with the modification that unaudited financial statements used as a basis for gross revenue calculations must be prepared in accordance with Generally Accepted Accounting Principles. This modification should ensure that all gross revenues calculations, audited and unaudited, are prepared consistently. It should also discourage bidders from manipulating unaudited financial statements to gain a competitive bidding or payment advantage. We seek comment on this proposal.

23. We note that in the *D, E, and F Block Report and Order* we amended our broadband PCS rules to require that an applicant's determination of average gross revenues be based on the three most recently completed fiscal or calendar years.⁵⁵ Should we adopt a similar rule for our general auction rules that would extend the same option of using either fiscal or calendar years to applicants in all auctionable services? We also note that prior to the *D, E, and F Block Report and Order*, broadband PCS applicants were required to state their average gross revenues as supported by audited financial statements or seek a waiver to use unaudited financial statements.⁵⁶ This requirement was simplified in the *D, E, and F Block Report and Order* to permit the use of unaudited financial statements without seeking a waiver.⁵⁷ We seek comment on whether our general definition of gross revenue should similarly allow the use of unaudited financial

⁵⁴ 47 C.F.R. § 24.720(f). See also 47 C.F.R. § 21.961 (MDS); 47 C.F.R. § 24.720 (narrowband PCS); 47 C.F.R. § 90.814 (SMR).

⁵⁵ *D, E, F Block Report and Order*, 11 FCC Rcd at 7891, ¶ 141; 47 C.F.R. § 24.720(f).

⁵⁶ *Id.* at 7849-50, ¶¶ 56-57, n 181.

⁵⁷ *Id.* at 7891, ¶ 140.

statements.

3. Attribution of Gross Revenues of Investors and Affiliates

24. Background. In determining whether an applicant meets certain size-based eligibility requirements, many of our service-specific competitive bidding rules require us to consider, *inter alia*, the gross revenues of certain investors in the applicant and the affiliates of attributable investors. "Affiliate" is defined by our general auction rules as an individual or entity that directly or indirectly controls or has the power to control the applicant; is directly or indirectly controlled by the applicant; is directly or indirectly controlled by a third person(s) that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant.⁵⁸ Some service-specific rules have adopted alternative definitions of "affiliate."⁵⁹

25. An "attributable" investor for purposes of size determinations has been defined differently in the rules for different services. In narrowband PCS, for example, a "control group" standard applies. Under this standard, the gross revenues and affiliations of an investor in the applicant are not considered so long as the investor holds 25 percent or less of the applicant's passive equity and is not a member of the applicant's control group,⁶⁰ and the control group holds at least 25 percent of the applicant's equity.⁶¹ Size standards in the broadband PCS entrepreneurs' block auctions include a 25 percent equity option and a 49.9 percent equity option. Under the 25 percent equity option, the gross revenues and total assets of a person or entity that holds an interest in the applicant or licensee, and its affiliates, are not considered so long as such person or entity holds only non-attributable equity equaling no more than 25 percent of the applicant's or licensee's total equity and is not a member of the applicant's or licensee's control group, and the applicant or licensee has a control group that complies with certain minimum equity and ownership requirements.⁶² Under the 49.9 percent equity option, the gross revenues and total assets of a person or entity that holds an interest in the applicant or licensee, and its affiliates, are not considered so long as such person or entity holds only non-attributable equity equaling no more than 49.9 percent of the applicant's or licensee's total equity and is not a member of the applicant's or licensee's control group, and the applicant or licensee has a control group that complies with certain minimum equity and ownership requirements.⁶³

⁵⁸ 47 C.F.R. § 1.2110(b)(4).

⁵⁹ See, e.g., 47 C.F.R. 24.720(l) (broadband PCS).

⁶⁰ See 47 C.F.R. § 24.320(h) (a control group is an entity, or a group of individuals or entities, that possesses *de jure* and *de facto* control of an applicant or licensee).

⁶¹ 47 C.F.R. § 24.320(b)(2).

⁶² 47 C.F.R. § 24.709(b)(3).

⁶³ 47 C.F.R. § 24.709(b)(4).

26. In the 900 MHz SMR service, in determining whether an applicant qualifies as a small business, we attribute the revenues of parties holding partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of the applicant in conformance with the spectrum cap attribution standard.⁶⁴ Our MDS rules, in contrast, attribute the gross revenues of the applicant and all its affiliates (as defined at 47 C.F.R. § 1.2110(b)(4)) to the applicant.⁶⁵ Our general competitive bidding rules do not contain size attribution provisions other than affiliation rules.

27. Discussion. We propose to adopt a uniform approach to financial size attribution for all auctionable services. Rather than the "control group" structure used in broadband and narrowband PCS, we propose to use a controlling interest threshold to determine whether an entity qualifies to bid as a small business. Thus, in calculating gross revenues, we would include the gross revenues of the controlling principals of the applicants and their affiliates, with the term "control" including both *de jure* and *de facto* control of the applicant.⁶⁶ We tentatively conclude that this standard, which we recently adopted in our IVDS rules, would simplify our size attribution rules and still enable small businesses to attract adequate financing.⁶⁷ We seek comment on this proposal.

28. We also seek comment on whether we should change our definition of affiliate. Should we, for example, amend our definition of affiliate to provide an exception for Indian tribes, Alaska Regional or Village Corporations, as we did for broadband PCS?⁶⁸ Also, we note that, earlier this year, the Small Business Administration amended and simplified its regulations governing the small business size standards in 13 C.F.R. Part 121, including amendment of its definition of "affiliate".⁶⁹ We seek comment on whether we should amend our rules to provide a similar "affiliate" definition, which would include, for example, the following general principles of affiliation: (1) concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both; and (2) factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, will be considered in determining whether an affiliation exists.⁷⁰

⁶⁴ 47 C.F.R. § 90.814(g).

⁶⁵ 47 C.F.R. § 21.961(b).

⁶⁶ See *Ellis Thompson Corp.*, 76 Rad. Reg. (P&F) 1125, 1127-28 (1994) (where the Commission identifies factors used to determine control of a business); see also, *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963).

⁶⁷ See *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order*, PP Docket No. 93-253 (Released November 21, 1996).

⁶⁸ 47 C.F.R. § 24.720(l)(11).

⁶⁹ See Small Business Administration, Amendment of Small Business Size Standards, *Final Regulations*, 61 Fed. Reg. 3177 (January 31, 1996); *Corrected Final Regulations*, 61 Fed. Reg. 41496 (August 9, 1996).

⁷⁰ 13 C.F.R. §§ 121.103(a)(1) and (2).

4. Definition of Rural Telephone Company

29. Background. Our current Part 1 rules define "rural telephone company" (or "rural telco") as any local exchange carrier, including affiliates, with 100,000 access lines or fewer.⁷¹ We noted at the time this definition was adopted that it comported with the definition that had been adopted for broadband PCS.⁷² More recently, however, the Commission revised the definition of rural telephone company contained in our broadband PCS rules to conform with that contained in the Telecommunications Act of 1996 ("1996 Act").⁷³ In taking that action, we stated that using the definition contained in the 1996 Act would likely expedite the delivery of advanced services to rural areas.⁷⁴ We also noted that adopting the 1996 Act definition would promote uniformity of regulations and is therefore consistent with the mandate of that legislation to ease regulatory burdens and eliminate unnecessary regulation.⁷⁵

30. Discussion. We tentatively conclude that the definition of rural telco set forth in the 1996 Act should apply to all auctionable services as the term is used in Section 309(j) of the Communications Act. Thus, Section 1.2110(b)(3) would be amended so as to define the term "rural telephone company" as a local exchange carrier operating entity to the extent that such entity -- (A) provides common carrier service to any local exchange carrier study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996. As we noted in the *D, E, and F Block Report and Order*, we believe adopting this definition in our Part 1 general auction rules will promote uniformity of regulations. We seek comment on this tentative conclusion.

5. Installment Payments

31. Background. Since the Commission began conducting spectrum auctions, installment

⁷¹ 47 C.F.R. § 1.2110(b)(3). The Commission has permitted rural telephone companies to acquire partitioned broadband PCS licenses through either bidding consortia or private negotiations, making it easier for them to participate in auctions and become providers of broadband PCS. See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, 5599 (1994).

⁷² *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7245, 7257.

⁷³ Pub. L. No. 104-104, § 3 110 Stat. 56 (1996) ("1996 Act"); *codified at* 47 U.S.C. § 153 (37). See also 47 C.F.R. § 24.720(e) and *D, E, F Block R&O*, 11 FCC Rcd at 7855, ¶ 62.

⁷⁴ See *D, E, F Block Report and Order*, 11 FCC Rcd at 7855, ¶ 66.

⁷⁵ *Id.*

payments have been utilized as a means of assisting small entities that are likely to have difficulty obtaining adequate private financing.⁷⁶ Thus, our general competitive bidding rules currently allow small businesses and other entities determined to be eligible on a service-specific basis to pay a substantial amount of their high bids in installments over the term of their licenses.⁷⁷ Pursuant to our Part 1 rules, unless otherwise specified, such installment payment plans (1) impose interest based on the rate of U.S. Treasury obligations at the time of licensing, plus a possible premium (2) allow installment payments for the full license term, (3) begin with interest-only payments for the first two years, and (4) amortize principal and interest over the remaining term of the license.⁷⁸ Additionally, winning bidders are required to execute a promissory note and security agreement as a condition to participate in the installment payment plan.⁷⁹ In the *Second Report and Order*, we determined that this framework for establishing installment payment plans would be an effective way to promote the participation of small businesses in the provision of spectrum-based telecommunications services and an effective tool for efficiently distributing licenses and services among geographic areas.⁸⁰

32. Changes in the basic framework of our installment payment plans have been made in specific services as we have gained experience from implementing our rules. In certain services the Commission has adopted "tiered" installment payment plans, which vary in terms of interest rate and payment terms, depending on the size of the licensee. For 900 MHz SMR, for example, we adopted a two-tiered installment payment plan structure. Entities with average gross revenues of not more than \$3 million over the three preceding years may make interest-only payments for five years, with interest accruing at the Treasury note rate. Entities with average gross revenues of not more than \$15 million over the three preceding years may make interest-only payments for the first two years of the license term, with interest accruing at the Treasury note rate plus an additional 2.5 percent.⁸¹ We also adopted a three-tiered installment payment plan structure for the broadband PCS C and F blocks.⁸² We determined that the tiered plans would broaden the scope of opportunities for small businesses.⁸³

⁷⁶ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389-91, ¶¶ 231-240.

⁷⁷ 47 C.F.R. § 1.2110(e).

⁷⁸ *Id.*

⁷⁹ See *supra* at ¶ 10.

⁸⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, ¶ 240.

⁸¹ 47 C.F.R. § 90.812(a).

⁸² See 47 C.F.R. § 24.711(b) (C block); 47 C.F.R. § 24.716(b) (F block).

⁸³ *Competitive Bidding Second Order on Recon./Seventh Report and Order*, 11 FCC Rcd at 2646, ¶ 18. See also Further Development of Paging Systems, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 61 Fed. Reg. 34,375 (Jul. 2, 1996); *Proposed Rule*, 61 Fed. Reg. 6212 (Feb. 16, 1996) (800 MHz SMR).

33. Discussion. Small businesses have been successful in the auctions in which installment payments plans were offered. These plans coupled with bidding credits, we believe, have resulted in new opportunities for small businesses to offer spectrum based services. In broadband PCS, installment payment plans were also provided to benefit entities larger than small businesses, entrepreneurs,⁸⁴ because of the capital-intensive nature of the service. While we seek to continue to offer these opportunities to small businesses, and possibly other entities, we seek comment on ways that we could refine our installment payment plans to streamline without reducing their benefit to small businesses. For example, we seek comment on whether the Commission or its designee should seek non-resource intensive means to screen applicants applying for installment payment plans to determine their credit worthiness, and if so, whether all bidders eligible for installment payments should be screened before the start of an auction, or only auction winners. If we were to adopt such screening, what information or standards should serve as criteria for judging a bidder's credit worthiness? Further, we seek comment on whether we should offer higher bidding credits in lieu of installment payments for winning bidders who qualify. We note that substituting a system of larger bidding credits might eliminate the administrative and market concerns associated with installment payments, while nonetheless ensuring opportunities for small businesses to participate in auctions. On the other hand, however, installment payment plans have been a useful tool for small businesses to access capital.

34. As an alternative to offering higher bidding credits in lieu of installment payments, we seek comment on whether we should require larger down payments, such as 30 or 40 percent, to reduce the amount of a bidder's high bid that is financed by the federal government. Increasing the amount of money a bidder has at stake in the event of a default may reduce the likelihood of default and will reduce the government's risk in the event of default. We also seek comment on whether we could achieve the same goal of reducing the likelihood of default by adopting a requirement that bidders increase their upfront payment during the course of the auction once their cumulative high bids exceed their upfront payment by some multiple. For example, once a bidder's cumulative bids were more than twenty-five times its upfront payment, it would be required to deposit additional funds with the Commission. We seek comment on this proposal and how it could be implemented, including the appropriate multiplier used to trigger the supplemental upfront payment obligation.

35. In addition, we propose that our general competitive bidding rules be amended to include a schedule of installment payment plans for designated entities seeking to participate in the provision of spectrum-based services. Defining available installment payment plans in our general competitive bidding rules would give potential bidders more certainty about the special provisions available to small businesses and other entities and promote uniformity of regulation. As discussed above, we believe that once a small business definition is adopted for a particular service, or other entities are identified as qualifying for installment payments, eligible businesses

⁸⁴ Section 24.709(a) defines an entrepreneur as an applicant that, including its affiliates, its owners, and its owners' affiliates has gross revenues of less than \$125 million in each of the last two years, and total assets of less than \$500 million at the time the FCC Form 175 application is filed. 47 C.F.R. § 24.709(a).

should be able to turn to our Part 1 rules to determine the specific terms available to them.⁸⁵ The following schedule of installment payment plans is a possible approach to implementing this concept.

⁸⁵ See *supra* ¶ 20-21.

Average gross revenues	Interest Rate	Payment Terms
Not to exceed \$3 million	T-note rate ⁸⁶	2 yrs. interest-only payments; amortize principal and interest over remaining license term
Not to exceed \$15 million	T-note rate + 1.5%	2 yrs. interest-only payments; amortize principal and interest over remaining license term
Not to exceed \$40 million	T-note rate + 2.5%	2 yrs. interest-only payments; amortize principal and interest over remaining license term
*Not to exceed \$75 million	T-note rate + 2.5%	amortize principal and interest over license term
*Not to exceed \$125 million	T-note rate + 3.5%	amortize principal and interest over license term

*These entities have never been defined as small businesses by our service-specific rules, but for broadband PCS they may have been eligible for installment payments as entrepreneurs.

The schedule set forth above is based in general on the plans adopted for our most recent auctions and, relying on our past auction experience, we believe these plans are appropriate. However, we recognize that plans with more generous terms were previously adopted for specific services.⁸⁷ We seek comment on whether we should incorporate a schedule of installment payments into our general auction rules while still retaining the authority to modify payment terms on a service-specific basis. Further, we seek comment on the appropriate schedule of payment terms.

⁸⁶ The maturity date of the Treasury note would correspond with the license term for the particular service (e.g., a 10-year broadband PCS licensee would calculate its interest rate according to a 10-year T-note).

⁸⁷ For instance, our broadband PCS rules confer on businesses with gross revenues of not more than \$75 million installment payment plans with an interest rate at the 10-year T-note rate plus 2.5 percent, with interest-only payments for the first year of the license. 47 C.F.R. § 24.716(b)(2). In comparison, the proposed plan for such businesses does not allow a one-year interest-only period.

36. Section 1.2110(e)(3)(i) of our rules indicates that the interest rate on installment payments will be the interest rate on Treasury obligations with maturities closest to the duration of the license term at the time of licensing.⁸⁸ More precisely, the interest rate is established by using the coupon interest rate for Treasury notes with similar maturities, at the most recent preceding Treasury auction.⁸⁹ We note that, in the *Competitive Bidding Second Report and Order*, we indicated both that we agreed with those commenters that suggested that interest on installments should be charged at a rate no higher than the government's cost of money and also that the interest rate imposed for installment payments should be equal to the rate for U.S. Treasury obligations of maturity equal to the license term.⁹⁰ We recognize that determining the interest rate for installment payment plans pursuant to Section 1.2110(e)(3)(i) may not always reflect the government's cost of money but it provides an objective benchmark for the interest rate determination. We believe that it would be beneficial to licensees for us to more clearly identify in our rules how the interest rate would be determined for all installment payment plans. We recognize that licensees must prepare business plans in conjunction with seeking capital from investors and lenders, and that a principal component of their total expenses is interest expense. We believe that providing certainty will enhance the ability of licensees to obtain financing by eliminating an investor's concern about fluctuating interest rates. Therefore, we propose to codify our existing policy by specifying that the interest rate for installment payments will be determined by taking the coupon rate of interest offered in the most recent Treasury auction preceding the close of the Commission's auction. We seek comment on this proposal. Further, we seek comment on whether we should adopt some other basis for computing interest. For example, should we establish more market-based interest rates with a cost of funds component and a premium for credit risk? If so, we ask commenters to discuss how we should determine the appropriate interest premium.

37. Where we use installment payment plans, we propose to set the interest rate for such payment plans on the date that the Public Notice is issued announcing the close of the auction and the winning bidders, based on rates established in the most recent Treasury auction with obligation of the appropriate term. Currently, Section 1.2110(e)(3)(i) of the Commission's general competitive bidding rules requires that the Commission impose interest based on the rate of U.S. Treasury obligations at the time of licensing.⁹¹ We tentatively conclude, however, that establishing the interest rate on the day that the Public Notice is released announcing the close of the auction is the most appropriate time for both licensees and the Commission. The close of the auction represents the most clearly identifiable time when an obligation to the Commission and the United States Treasury is established. At that time bidders' financial obligations for the license(s)

⁸⁸ *Id.*

⁸⁹ For example, for C Block licensees who were conditionally granted licenses on September 17, 1996, the most recent auction of 10-year Treasury notes occurred on August 7, 1996, and had a coupon interest rate of 7%. *Source*: Bureau of the Public Debt, U.S. Treasury Department.

⁹⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2390-91, ¶ 239.

⁹¹ 47 C.F.R. § 1.2110(e)(2)(i).

won are confirmed, and there is no need to defer establishment of the interest rate. Establishing the interest rate in this way also provides a uniform date on which the interest rate for all prospective licensees within a particular service is established, regardless of petitions to deny or other delays that may vary among bidders. In addition, we believe that establishing the interest rate at a date earlier than the date of licensing would assist bidders in efforts to obtain financing, as interest expense would be calculable from a specific known date. Furthermore, we believe that establishing the interest rate as we propose would reduce the interest rate risk to the bidder and mitigate this risk to the capital investor. While our review of the rate patterns for 10-year U.S. Treasury obligations indicates that there is minimal volatility in the 10-year Treasury rate, interest rate fluctuations between the close of an auction and the date of licensing are just as likely to adversely impact the Commission as they are to adversely impact the licensees and/or their capital investors. Establishing the interest rate earlier than the point of licensing would also permit the licensee to receive, review, and return the necessary note and security agreement earlier, which would also speed the licensing process. This, in turn, should hasten the development of service to the marketplace. Alternatively, we could establish the interest rate for the installment payment plan in the Public Notice announcing the start of the auction, with the rate based on the most current Treasury rate on that date. This would enable both bidders and potential capital investors to better assess a bidder's prospective financial obligations during the auction. We seek comment on each of our proposals, tentative conclusions, and alternatives.

6. Bidding Credits

38. Background. Under the current general competitive bidding rules, the Commission may award bidding credits (*i.e.*, payment discounts) to eligible designated entities. These general rules also provide that service-specific rules will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits, and other procedures.⁹² Accordingly, the Commission has adopted separate rules governing bidding credits for various auctionable services.⁹³

39. Discussion. As with installment payments, we believe that our general competitive bidding rules should be amended so that the levels of available bidding credits are defined, and are uniform for all auctionable services. We believe such an approach will be beneficial because potential bidders will have more information well in advance of the auction than they currently do about how such levels will be set.⁹⁴ We believe that, once a small business definition is adopted for a particular service, eligible businesses should be able to refer to our Part 1 rules to determine the level of bidding credit available to them. The following schedule is a possible approach to implementing this concept.

⁹² 47 C.F.R. § 1.1110(f).

⁹³ *See, e.g.* 47 C.F.R § 24.712.

⁹⁴ *See supra* at ¶ 36-38.

Average Annual Gross Revenues	Bidding Credits
Not to exceed \$3 million	25%
Not to exceed \$15 million	15%
Not to exceed \$40 million	10%

We recognize that these credits may differ from those previously adopted for specific services.⁹⁵ Based on our past auction experience, however, we believe that the approach taken here would provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions. In addition, we believe that providing slightly less generous bidding credits for larger businesses (*e.g.*, those businesses with gross revenues not exceeding \$40 million) would more specifically tailor the amount of the credit to the needs of the particular applicant. We seek comment on this schedule, and we also ask interested parties to suggest alternatives. For example, does the demand for capital to implement certain services justify including businesses with average annual gross revenues exceeding \$40 million on this schedule? We recognize that we have suggested that it might be appropriate in some cases to provide larger bidding credits in lieu of installment payments.⁹⁶ We are aware that in developing their auction strategy, bidders make calculations about the net present value of their bids and factor in their ability to obtain financing. Therefore, the same net effect can be achieved by giving either higher bidding credits or more generous installment payment terms. If we limited the use of installment payments, how should that action affect levels of bidding credits?

⁹⁵ For instance, a business with average gross revenues of not more than \$3 million in the 900 MHz SMR auction received a 15% bidding credit rather than a 25% bidding credit as proposed here. See 47 C.F.R. § 90.814(b)(2). In contrast, a business with average gross revenues of not more than \$15 million in the broadband PCS F block auction will receive a 25% bidding credit rather than the 15% bidding credit proposed here. See 47 C.F.R. § 24.717(b).

⁹⁶ See *supra* at ¶ 34.

7. Unjust Enrichment

40. Background. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing installment payments is required to pay the remaining principal balance as a condition of the transfer. No payment is required, however, when the proposed transferee or assignee is qualified to obtain the same installment financing and assumes the applicant's installment payment obligations.⁹⁷ Many of our service-specific auction rules include similar provisions.⁹⁸ However, some service-specific unjust enrichment provisions for installment payments contain certain variations from the general rule set forth in Part 1. The broadband PCS unjust enrichment rule, for example, specifies that applicants seeking to assign or transfer control of a license to an entity not meeting the eligibility standards for installment payments must pay not only unpaid principal as a condition of Commission approval but also any unpaid interest accrued through the date of assignment or transfer.⁹⁹ This rule also provides that if a licensee utilizing installment financing seeks to make any change in its ownership structure that would result in the loss of eligibility for installment payments, it must pay the unpaid principal and accrued interest as a condition of Commission approval of the change.¹⁰⁰ Finally, in recognition of the tiered installment payment plans offered to broadband PCS licensees, the rule provides that if a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan, it must seek Commission approval and adjust its payment plan to reflect its new eligibility status.¹⁰¹ A licensee, under this rule, may not switch its payment plan to a more favorable plan.

41. Under our general competitive bidding rules, a licensee seeking Commission approval of a transfer of control or an assignment of a license acquired through the competitive bidding process utilizing bidding credits, or proposing to take any other action relating to ownership or control that will result in loss of eligibility for such bidding credits, is required to pay the sum of the amount of the bidding credit plus interest as a condition of FCC approval.¹⁰² Under our broadband PCS rules, if, within the original term, a licensee applies to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid to the United States Treasury as a condition of approval of the assignment or

⁹⁷ 47 C.F.R. § 1.2111(c).

⁹⁸ See, e.g., 47 C.F.R. § 90.812(b) (900 MHz SMR).

⁹⁹ 47 C.F.R. § 24.716(c)(1).

¹⁰⁰ 47 C.F.R. § 24.716(c)(2).

¹⁰¹ 47 C.F.R. § 24.716(c)(3).

¹⁰² 47 C.F.R. § 1.2111(d).

transfer.¹⁰³

42. Discussion. We propose to amend our general unjust enrichment rules to conform them to our broadband PCS rules. We believe that these rules are preferable to our current general unjust enrichment rules because they provide greater specificity about funds due at the time of transfer or assignment and specifically address changes in ownership that would result in loss of eligibility for installment payments, which the current general rules do not address. The broadband PCS rules also address assignments and transfers between entities qualifying for different tiers of installment payments or bidding credits, thus supplying clearer guidance for auctions in which tiered installment payment plans or bidding credits are provided. We seek comment on this proposal. Further, we seek comment on whether we should adopt an unjust enrichment provision that provides a scale of decreasing payment liability based on the number of years a license is held as we have recently done for other services.¹⁰⁴ For example, should we adopt a rule that provides that a business that holds a license that it obtained with a bidding credit must pay back 60 percent of its bidding credit if it transfers the license after five years; 50 percent after eight years; 40 percent after nine years; and 20 percent after ten years? We also solicit comment on unjust enrichment rules as they apply to partitioning and disaggregation.¹⁰⁵ If we decide to adopt partitioning and disaggregation for various services, how should the unjust enrichment rules apply when the partitioner or disaggregator is the recipient of a bidding credit or is paying on an installment payment plan? Should we adopt for all auctionable services the same provisions that we adopted for broadband PCS?¹⁰⁶

C. Application Issues

1. Electronic Filing

43. Background. In recent auctions, we have allowed applicants to file their applications either manually or electronically. Required exhibits to short-form and long-form applications that were filed manually must be submitted on a 3.5 inch diskette in ASCII text (.txt) format. Only applicants in these auctions that have filed their short-form applications electronically have been allowed to bid electronically from remote locations. Those filing manually have been permitted to bid only telephonically.

44. Discussion. We believe that requiring all applications to be filed electronically is in

¹⁰³ 47 C.F.R. §§ 24.712(b)(2), 24.717(c)(2).

¹⁰⁴ See, e.g., 47 C.F.R. § 27.209(d)(2) (Wireless Communications Service ("WCS")).

¹⁰⁵ See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order*, 11 FCC Rcd 10187 at 10197, ¶¶ 16-17 (1996).

¹⁰⁶ *Id.*

the best interest of auction participants as well as members of the public interested in monitoring Commission auctions. The Commission has developed user-friendly electronic filing software and Internet World Wide Web forms to give auction applicants the ability to conveniently file and review applications.¹⁰⁷ This software helps applicants ensure the accuracy of their applications as they are filling them out, and enables them to correct errors and omissions prior to submitting their applications. To assist the public, we provide technical support personnel to answer questions and work with callers installing software and using the electronic auction system. Electronic filing also promotes access to applications by competing bidders as well as the general public by making it possible to review and download applications without travelling to FCC headquarters or arranging with a contractor for photocopying of paper applications. We note that in the recently completed broadband PCS D, E, and F block auction 94 percent (135 of 153) of the qualified bidders filed their short-form applications electronically.¹⁰⁸

45. We therefore tentatively conclude to amend Sections 1.2105(a) and 1.2107(c) of our rules to require that all short-form and long-form applications be filed electronically beginning January 1, 1998.¹⁰⁹ We recognize that there is a need for a period of time before a comprehensive electronic filing requirement becomes effective in order for bidders to prepare and be completely comfortable with this process. We believe that the effective date proposed here will provide potential bidders with adequate time in which to adapt to electronic filing requirements. We note that a phase-in period is similar to the approach taken by the Securities and Exchange Commission when it eliminated paper financial filings.¹¹⁰ We seek comment on this tentative conclusion.

2. Short-form Application Amendments

46. Background. Section 1.2105(b) of our rules addresses modifications and amendments to FCC Form 175. Specifically, Section 1.2105(b)(2) provides that bidders may make minor changes or correct minor errors in the FCC Form 175 application, but major amendments may not

¹⁰⁷ We assess no fee for filing applications electronically but do charge \$2.30 a minute for reviewing or downloading applications of other parties on line. *See* Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, Online Communications Service Charges and Bidder's Information Packages in Connection with Auctionable Services, *Report and Order*, No. 95-308, 60 Fed. Reg. 38276 (July 26, 1995). The public can also download other auctions related documents for no charge from the FCC internet site ([http\www.fcc.gov](http://www.fcc.gov)).

¹⁰⁸ We also note that in response to our recent *Notice of Inquiry* regarding improving the Commission's processes, commenters were in favor of electronic filing. Improving the Commission's Processes, *Notice of Inquiry*, PP Docket No. 96-17, FCC 96-50 (released Feb. 14, 1996). They cited as their reasons ease of filing, increased accuracy, and greater access to the Commission by individuals located outside of Washington. Commenters also praised the FCC's electronic filing system because it eliminates the necessity of having to carry large documents to the Commission. *See, e.g.,* Comments of GTE at 18.

¹⁰⁹ 47 C.F.R. §§ 1.2105(a) and 1.2107(c).

¹¹⁰ *See* 17 C.F.R. § 232.902(a).

be submitted after the initial application deadline.¹¹¹ This section further provides that the Commission will classify all amendments as major or minor pursuant to service-specific rules.

47. Discussion. We propose to amend our general auction rules to define major amendments to FCC Form 175 uniformly for all auctionable services. We propose at a minimum to consider any change in ownership that constitutes a change in control to be a major amendment. We also propose to consider application amendments that show a change in an applicant's size which would affect its eligibility for small business provisions to be a major amendment.¹¹² We also seek comment on which other kinds of changes should be deemed major, and which should be deemed minor. For example, how should we treat changes to the licenses selected in simultaneous multiple round auctions? In previous auctions, applicants have claimed that they made mistakes in their license selection and have requested that the Commission allow them to add or delete license selections during the resubmission period. While the Commission has generally refused to grant these requests in order to prevent collusive conduct or gaming that would reduce the competitiveness of the auction, there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add licenses to their FCC Form 175 applications. We therefore ask commenters to consider whether an amendment to add licenses should be permissible as a minor amendment. If so, we also ask whether such an amendment should be permitted only until the deadline for submitting upfront payments, because after that point the risks of gaming in the auction increase due to the availability of information concerning each bidder's eligibility. For example, should an applicant be permitted to add a license designation to its short-form application only if that license already has been designated by two or more applicants? We seek comment on each of these proposals.

3. Ownership Disclosure Requirements

48. Background. Currently, our general competitive bidding rules do not set forth any ownership disclosure requirements for auction applicants on their short-form applications. Our service-specific rules, however, require varying degrees of specific ownership information from applicants. For example, in the 900 MHz SMR auction, applicants claiming small business status were required to disclose on their short-form application the names of each affiliate and a gross revenues calculation. On their long-form application, they were required to disclose an additional gross revenues calculation, any agreements that support small business status, and any investor protection agreements.¹¹³

¹¹¹ 47 C.F.R. § 1.2105(b).

¹¹² For example, if Company A, an applicant that qualified for special provisions as a small business, merges with Company B during the course of an auction, and if, as a result of this merger, the merged company would not qualify as a small business, the amendment reflecting the change in ownership of Company A would be considered a major amendment. Treatment of such an ownership change as a minor amendment would enable the new entity to receive small business bidding credits and installment payments when it does not qualify for them.

¹¹³ 47 C.F.R. § 90.815(b).

49. Both our narrowband PCS and broadband PCS rules require detailed ownership disclosure from all auction applicants that differ from each other and from the 900 MHz SMR requirement. Rules for narrowband and broadband PCS also state additional requirements for applicants claiming designated entity status. On both the short- and long-form applications for narrowband PCS, applicants must submit a list of (1) any business five percent or more whose stock, warrants, options, or debt securities are owned by the applicant, (2) any business which holds a five percent or more interest in the applicant or any business in which a five percent or more interest is held by another company which holds a five percent interest in the applicant, (3) entities holding a five percent or more interest in the applicant, and (4) partners in a partnership.¹¹⁴ Short-form applicants claiming designated entity status also are required to list all control group members and provide a calculation of gross revenues and personal net worth.¹¹⁵ Although the broadband PCS requirements are very similar to those for narrowband PCS, we have recently amended the broadband PCS application requirements to make them less burdensome on applicants. Thus, broadband PCS applicants are required to disclose on both short-form and long-form applications a list of (1) any business, holding or applying for CMRS or PMRS licenses, five percent or more of whose stock, warrants, options or debt securities are owned by the applicant, (2) any party which holds a five percent or more interest in the applicant, or any entity holding or applying for CMRS or PMRS licenses in which a five percent or more interest is held by another party which holds a five percent or more interest in the applicant, (3) any person holding five percent or more of each class of stock, warrants, options, or debt securities, and (4) in the case of partnerships, the name and address of each partner.¹¹⁶ Broadband PCS applicants that claim designated entity status must also identify control group members and provide net asset and gross revenues figures.¹¹⁷ This information was necessary at the short-form stage for the C and F blocks because participation in these blocks was limited to entities below a net asset and gross revenue threshold.

50. Discussion. We continue to believe that detailed ownership information is necessary to ensure that applicants claiming designated entity status in fact qualify for such status, and to ensure compliance with spectrum caps and other ownership limits. Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules. A standard disclosure requirement, however, would avoid the variation and possible inconsistency found in our current service-specific ownership disclosure requirement. Thus, we seek comment on whether we should adopt standard ownership disclosure requirements for all auctionable services that are similar to our current rules for broadband PCS. We also seek comment on what ownership information should be required. Finally, we ask commenters to address whether ownership

¹¹⁴ 47 C.F.R. § 24.413(a)(1)-(4).

¹¹⁵ 47 C.F.R. § 24.309(c).

¹¹⁶ 47 C.F.R. § 24.813.

¹¹⁷ 47 C.F.R. § 24.709(c).

disclosure should vary depending on whether an applicant is applying for special provisions, such as bidding credits or installment payments.

51. In addition, we also propose to adopt a uniform reporting requirement for all applicants claiming designated entity status. Specifically, we propose to adopt a reporting requirement similar to that in the 900 MHz SMR rules.¹¹⁸ That rule, unlike the broadband PCS rule, focuses on affiliates and their gross revenues rather than more complex control group equity structures.¹¹⁹ In keeping with our proposal to adopt the simpler controlling principals and affiliates test, we propose an analogous reporting requirement. Therefore, we propose that applicants claiming small business status be required to disclose on their short-form application the names of each controlling principal and affiliate and gross revenues calculations for each. On their long-form applications, they would be required to disclose any additional gross revenues calculations, any agreements that support small business status, and any investor protection agreements. We seek comment on this proposal.

4. Ownership Disclosure Filings

52. Background. Currently, the Commission's ownership disclosure rules require applicants to file specific ownership information, in conjunction with their FCC Form 175, prior to each auction.¹²⁰ Similarly, at the close of each auction, winning bidders are required to file ownership information on each long-form application.¹²¹

53. Discussion. We believe that by requiring these ownership disclosure filings, we ensure that we receive all the information necessary to evaluate an applicant's qualifications. We note, however, that these requirements could result in duplicative filings. For example, where licenses for a service are offered in a series of blocks, as in the case of broadband PCS, an entity may wish to participate in several auctions. Under our rules, such an entity would be required to disclose the same information a number of times.¹²² In order to streamline the application procedure at both the short-form and long-form stage, we request comment on whether we should create a central database of licensee and bidder data, which would allow bidders to avoid repeating ownership information in each application in each auction. We tentatively conclude that applicants should be able to file ownership information to apply for the first auction in which they

¹¹⁸ 900 MHz SMR *Report and Order*; Bidder Information Package for 900 MHz SMR (November 28, 1995).

¹¹⁹ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Order on Reconsideration and Seventh Report and Order*, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252, 11 FCC Rcd 2639 (1995).

¹²⁰ See 47 C.F.R. § 1.2105(a)(2). See also FCC Form 175 ¶¶ 1-5, 8-10, certification and exhibit requirements [October 1995].

¹²¹ See 47 C.F.R. § 1.2107(c) - (d). See also FCC Form 600 ¶¶ 1-16, 29-33, and 39 [January 1995].

¹²² 47 C.F.R. §§ 24.413, 24.709(c) and 24.813.

participate and that this information should then be stored in a central database which subsequently would be updated each time applicants participate in another auction. After applying for its first auction, an applicant filing for a subsequent auction would either update the ownership information in the database, or rely on the information in the database and certify that there have been no changes. We believe this approach would benefit auction applicants by reducing the time spent preparing auction applications, and it would benefit the Commission by eliminating the need to review and analyze duplicative filings. We seek comment on this approach to ownership disclosure.

5. Audits

54. Under our broadband PCS rules, we have reserved the right to conduct random audits of applicants and licensees in order to verify information provided regarding their eligibility for certain special provisions.¹²³ Such entities certify their consent to audits on their short-form applications. We propose to explicitly reserve this right for all auctionable services. We seek comment on this proposal.

D. Payment Issues

1. Refund of Upfront Payments

55. Background. Section 309(j)(8)(C) of the Communications Act as amended by the Telecommunications Act of 1996, requires that any deposits the Commission may require for the qualification of any person to bid in an auction shall be deposited into an interest bearing account.¹²⁴ The Communications Act further requires that within 45 days of the auction's conclusion, the deposits of successful bidders shall be paid to the Treasury, the deposits of unsuccessful bidders shall be returned, and all accrued interest shall be transferred to the Telecommunications Development Fund.¹²⁵ Prior to the enactment of this provision, auction deposits were submitted to a non-interest bearing account with the Department of Treasury. Bidders who completely withdrew prior to the close of the auction could, upon written request, receive a refund of their upfront payments prior to the close of the auction.

56. Discussion. It is unclear whether Congress intended, by enacting this new law, to require the Commission to change its practice of refunding upfront payments to bidders who withdraw during the course of an auction. We believe that our current practice of returning the upfront payments of bidders who have completely withdrawn prior to the conclusion of competitive bidding is in the public interest as it prevents unnecessary encumbrances on the funds of auction bidders, many of whom may be small businesses, after they have withdrawn from the

¹²³ 47 C.F.R. § 24.709(d).

¹²⁴ 47 U.S.C. § 309(j)(8)(C).

¹²⁵ *Id.*

auction. We seek comment on this practice and whether it is consistent with the Communications Act.

2. Down Payments

a. Levels of Payments

57. Background. We determined in the *Competitive Bidding Second Report and Order* that, upon the conclusion of the auction, a bidder must tender a significant and non-refundable down payment to the Commission over and above its upfront payment in order to provide further assurance that the winning bidder will be able to pay the full amount of its winning bid.¹²⁶ We thus required that, within five business days after being notified that it is a high bidder on a particular license, a high bidder must submit to the Commission additional funds as are necessary to bring its total deposits up to 20 percent of its high bid(s).¹²⁷

58. Discussion. In the *Order* accompanying this *Notice*, we modified the due date for down payments to ten business days after the issuance of a Public Notice announcing winning bidders.¹²⁸ Also we note that Bureau practice is to mail this Public Notice to winning bidders but that this does not relieve bidders of their obligation to obtain relevant public notices. In this *Notice*, we propose to retain discretion to determine the down payment amount required for each service and delegate authority to the Bureau to announce this amount in a Public Notice to be issued prior to the start of the auction. In exercising this authority, as discussed above, the Bureau will seek input from the public.¹²⁹ We continue to believe that a substantial down payment is needed to ensure that licensees have the financial capability to attract the capital necessary to deploy and operate their systems, and to protect against default. We believe that giving the Bureau the discretion to determine the level of down payments for each auction would be the best way to ensure that such levels remain appropriate for developing and evolving industries. We seek comment on this proposal. We also seek comment on whether the level of down payments which we have used in the past should be raised for some services.

b. Late Fee

59. Background. Section 1.2109(a) of the Commission's rules provides that auction winners not eligible for installment payments are generally required to make final payment on their license(s) within a certain time following award of the license(s). Section 1.2110(e) of the Commission's rules provides that all winning bidders eligible for installment payments are required

¹²⁶ *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2381, ¶¶ 189-92.

¹²⁷ 47 C.F.R. § 1.2107(b).

¹²⁸ See *supra* at ¶ 14.

¹²⁹ See *supra* at ¶ 16.

to submit a second down payment within a certain time of the license grant. These payment deadlines are announced by public notice when the Commission has granted or is prepared to grant the license(s). Where a winning bidder fails to make its final auction payment for the balance of its winning bid or fails to make the second down payment in a timely manner, it is considered in default on its license(s) and subject to the applicable default payments.¹³⁰ In past auctions, there have been cases where a winning bidder applicant missed the applicable second down payment deadline but subsequently made its down payment and filed a request seeking a waiver of the deadline. In some of these cases, the Bureau granted the waivers, subject to payment of a five percent late fee. In granting the waivers, the Bureau recognized the licensee's good faith and ability to pay as evidenced by its timely remittance of all earlier payments and prompt action to cure the delinquency.¹³¹

60. Discussion. We continue to believe that the strict enforcement of payment deadlines preserves the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications. In this connection, we believe that the *bona fide* ability to pay demonstrated by a timely first down payment is essential to a fair and efficient auction process and, thus, we do not propose to modify our approach of requiring timely submission of first down payments. We nonetheless recognize that applicants may encounter certain difficulties when trying to arrange financing and make substantial payments under strict deadlines. In circumstances which may warrant favorable consideration of a waiver request or an extension of the payment date, we must also evaluate the fairness to other licensees who made their payment in a timely fashion. Accordingly, we propose to allow winning bidders to make their final payments or second down payments within a short period after the applicable deadline, provided that they also pay a late fee. We believe that, by committing substantial capital to their license acquisition in the form of an initial down payment, winning bidders have demonstrated a *bona fide* interest in becoming a licensee, but have also incurred a substantial debt to the federal government. We, therefore, seek comment on the appropriate time period to allow late second down payments and final payments. We believe that the late payment period should be short (*e.g.*, no longer than 10 business days). We tentatively conclude that, if a winning bidder misses the final payment or second down payment deadline and also fails to remit the required payment (plus the applicable late fee) by the end of the late payment period, it would be declared in default and subject to the applicable default payments. We seek comment on this tentative conclusion.

61. Additionally, we seek comment on the appropriate fee to impose for late payment. Because we believe that the late payment fee should be large enough to deter winning bidders from making late payments and yet small enough so as not to be punitive, we tentatively conclude that a late payment of five percent of the amount due is consistent with general commercial

¹³⁰ 47 C.F.R. §§ 1.2104(g), 1.2107(c).

¹³¹ See, *e.g.*, In the Matter of Roberts-Roberts & Associates, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets, DA 97-252, Released February 4, 1997; In the Matter of Longstreet Communications International, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market B012, DA 97-251, Released February 4, 1997.

practice and provides some recompense to the federal government for the delay and administrative or other costs incurred.¹³² We seek comment on this proposal and ask that commenters proposing alternative late payment fee(s) provide a rationale for the alternative fee amount(s).

62. This proposal to allow late payments is limited to payments owed by winning bidders that have had their licenses conditionally granted or where the license grant is imminent. As indicated above, we do not propose to adopt a late payment period for initial down payments that are due soon after the close of the auction. We believe it is reasonable to expect that winning bidders timely remit their initial down payments, given that is their first opportunity to demonstrate to the Commission their ability to make payments towards the licenses of interest to them. Further, if a winning bidder defaults on its initial down payment on a license, the Commission can take action under Section 1.2109(b) relatively soon after the auction has closed, by, for example, re-auctioning the license or offering it to the other highest bidders (in descending order) at their final bids. Similarly, we do not propose to allow any late submission of upfront payments. Allowing late submission of upfront payments would slow down the licensing process by delaying the start of an auction.

c. Second Down Payments

63. Background. Under our current rules, winning bidders that are designated entities are not required to pay their second down payment until petitions to deny filed against them are dismissed or denied. In the interim, designated entity winning bidders for the same auction with no petitions filed against them are required to submit their second down payments earlier because their licenses are ready for grant.

64. Discussion. We seek comment on whether we should require all designated entities that win licenses to make their second down payments at the same time. If so, one way to implement this would be for winning bidders who have petitions to deny pending against them to submit their second down payments to the Commission to be deposited into an escrow account. If the petitions to deny are granted, the bidder would be refunded the amount of the second down payment subject to any default payments owed the Commission. If the petitions to deny are dismissed or denied, the funds would be transferred from the escrow account and applied to the balance owed by the licensee. This procedure would have the effect of ensuring that all designated entities pay their down payments in a uniform fashion, thus, reducing any potential inequities that could result from differing payment dates. It would also avoid requiring a bidder with petitioned and non-petitioned licenses to make several payments to the Commission. We seek comment, however, on whether this procedure would affect the ability of bidders that are subject to petitions to deny to access capital to make their down payments. We also seek comment on whether all non-designated entities should be required to make payment in full at the same time for the same reasons discussed in connection with designated entities.

¹³² See, e.g., Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

3. Default Payments

65. Background. Section 1.2104(g) of our rules provides that when a bidder withdraws, defaults, or is otherwise disqualified from a simultaneous multiple round auction, upfront and/or down payment amounts that the bidder has on deposit with the Commission will be applied first to the bid withdrawal and default payments owed the Commission.¹³³ This rule has been interpreted to encompass upfront and/or down payment funds a bidder has on deposit for licenses won at the same auction.¹³⁴

66. Discussion. We propose to delete the language "simultaneous multiple round" from Section 1.2104(g) of our rules because we believe that it should apply to other auction designs with equal force as it does to a simultaneous multiple round auction. We believe strict rules regarding default payments will discourage insincere bidding, maintain the integrity of the auction and ensure that licenses end up in the hands of those parties that value them the most and have the financial capacity to provide service. We seek comment on this proposal.

67. In the *Competitive Bidding Fifth Report and Order*, the Commission provided that, where the default payment cannot be determined at the time of default by a broadband PCS licensee (*e.g.* because the license has not yet been reaucted), the Commission can obtain a deposit on the default payment to be held on deposit until such time as the final default obligation can be determined. This deposit is held by the Commission until the final default payment can be

¹³³ See 47 C.F.R. §§ 1.2104 (g)(2); 1.2106(d),(e); 1.2107(b). Specifically, Section 1.2106(e) states:

(e) In accordance with the provisions of paragraph (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments *on deposit with the Commission* will be used to satisfy the bid withdrawal or default penalty before being applied toward *any* additional payment obligations that the high bidder may have.

Section 1.2106(d), cross-referenced above, states:

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount *after determining that no bid withdrawal penalties are owed by that bidder*.

Section 1.2104, also cross-referenced above, at paragraph (g)(2) states:

If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in subsection (1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from *any* upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

Finally, Section 1.2107(b) talks of applying upfront and down payments to satisfy penalties. See §§ 1.2107(b) ("a high bidder must submit to the Commission's lockbox bank such additional funds (the 'down payment') as are necessary to bring its total deposits (*not including upfront payments applied to satisfy penalties*) up to twenty (20) percent of its high bid(s). . . . Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, *less applicable penalties*.").

¹³⁴ *Public Notice*, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481, April 6, 1996. *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2382 ¶ 195. See also, In the Matter of CH PCS, Inc, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, DA 96-1273 (rel. August 9, 1996.)

established and is paid.¹³⁵ The purpose of this provision is to maintain the integrity of the auction by discouraging defaults on the part of bidders, encouraging bidders to make secondary or back-up financial arrangements, and ensuring that default payments are made in a timely manner. We propose to modify our rules to provide for a similar default deposit for all auctionable services of at least three percent (3%) of the defaulted bid amount.¹³⁶ We seek comment on this proposal.

4. Installment Payments

a. Late Payments

68. Background. For the broadband PCS F block auction, we amended the terms of the installment payment plans to provide for late payment fees. Thus, when licensees are late in their scheduled installment payments, the Commission will charge a late payment fee equal to five percent (5%) of the amount of the past due payment.¹³⁷ We instituted this fee because we concluded that, without it, licensees may not have adequate financial incentives to make installment payments on time and may attempt to maximize their cash flow at the government's expense by paying late.¹³⁸

69. Discussion. We seek comment on whether we should adopt, for all auctionable services, a late payment fee on any installment payment that is overdue. The late fee could be set, for example, at a rate that is equal to five percent (5%) of the overdue payment. Thus, if a \$50,000 payment were due on June 30, an additional \$2,500 late payment fee would be due on July 1. Such payment would accrue on the next business day following the payment due date and would be payable with the next quarterly installment payment obligation. This fee would be assessed for each quarterly payment submitted late. Payments would be applied in the following order: late charges, interest charges, principal payments. Thus, a licensee who makes payment after the due date but does not make payment sufficient to pay the late fee, interest, and principal, will be deemed to have failed to make full payment and will be subject to license cancellation pursuant to the Commission's rules. We tentatively conclude that such a late payment provision is necessary to ensure that licensees have an adequate financial incentive to make installment payments on time. We seek comment on this tentative conclusion. We note that licensees would continue to have 90 days before a payment is deemed delinquent but a late payment fee would be assessed during this period.

b. Grace Periods

¹³⁵ See *D, E, F Block Report and Order*, 11 FCC Rcd at 7860-61, ¶ 78; *Second Memorandum and Order*, *Third Notice of Proposed Rulemaking*, 11 FCC Rcd at 2860, ¶ 108.

¹³⁶ See *C. H. PCS, Inc.*, BTA No. B347 Frequency Block C, *Order*, DA 96-1825 (rel. November 4, 1996).

¹³⁷ 47 C.F.R. § 24.716(c).

¹³⁸ *D, E, F Block Report and Order*, 11 FCC Rcd at 7846, ¶ 48.

70. Background. Section 1.2110(e)(4)(ii) of the Commission's rules provides that interest that accrues during a grace period will be amortized over the remaining term of the license.¹³⁹ Amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden by requiring formulation of a new amortization schedule.

71. Section 1.2110(e)(4)(ii) also states that in considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. Under this rule, licensees are required to come before the Commission with a filing as well as financial information such as an income statement or balance sheet, in the case of financial distress, to provide the necessary information for the Commission to make its ruling. Licensees are then required to wait for a ruling by the Commission before knowing whether a grace period has been granted or denied. This could place licensees in a position of uncertainty if they are seeking to restructure other debt contingent upon the results of the Commission's grace period ruling.

72. Discussion. In order to avoid the potential problems associated with changing the amount of installment payments, we propose to amend Section 1.2110(e)(4)(ii) to require all current licensees who avail themselves of the grace period to pay all fees, all interest accrued during the grace period, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period. We seek comment on this proposal.

73. Further, to simplify the grace period procedures, we propose to revise the method by which grace periods are provided. The Commission or its designee may not have the necessary resources to evaluate a licensee's financial condition, business plans, and capital structure proposals. Therefore, instead of considering grace period requests, we could institute the following system: if a licensee did not make payment on an installment obligation within 90 days of its due date, then the licensee would automatically receive an additional 90 days to make that payment contingent upon receipt of the 5 percent late payment fee proposed above¹⁴⁰ plus an additional late payment fee of 10 percent. The late payment fee that we propose here is greater than the 5 percent late payment fee that we propose for non-grace- period late installment payments because we envision the grace period as an extraordinary remedy and wish to encourage licensee to seek private market solutions to their capital problems before the payment due date or,

¹³⁹ 47 C.F.R. § 1.2110(e)(4)(ii).

¹⁴⁰ See *supra* at ¶ 70.

at a minimum, within 90 days of the due date. Under this proposal licensees would not be required to submit a filing to receive a grace period; however, licensees would be expected to resume payments after the 90 day grace period is over. This approach would also be consistent with the standard commercial practice¹⁴¹ of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates. Payments from the licensee would be applied to late fees, interest, and principal, in that order. Any licensee that did not make full payment of all amounts, including a total late payment fee of 15 percent, within 180 days of the payment due date would have its license automatically cancelled as provided in Section 1.2110(e)(4)(ii). We seek comment on this method of providing for an automatic grace period.

c. Default on Installment Payments

74. Background. We also seek comment on whether licensees that default on installment payment obligations should be subject to the default payment provisions outlined in Section 1.2104(g), *i.e.*, the difference between the defaulting winner's bid and the subsequent winning bid plus 3 percent of the lesser of these amounts. Sections 1.2110(e)(1) and 1.2110(e)(2) provide that applicants eligible for installment payments will be liable for such a payment if they fail to remit either their initial or final down payment.¹⁴² Section 1.2110(e)(4)(iii) provides that following the expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or upon default with no such request submitted, the license of an entity paying on an installment basis will be cancelled automatically.¹⁴³ This section does not state, however, that under these circumstances the licensee will be liable for the default payment set forth in Section 1.2104(g).

75. Furthermore, we have been asked to address the issue of cross default in the context of installment payments.¹⁴⁴ A cross-default provision would specify that if a licensee defaults on one installment payment loan, it would also default on any other installment payment loans it holds. These provision are standard in credit-related agreements.¹⁴⁵

76. Discussion. We tentatively conclude that a licensee that makes the necessary down payments but defaults on installment payments should not be exempt from the default payment provisions of Section 1.2104(g). Licensees that default at any point in the auction process, either

¹⁴¹ See, *e.g.*, Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

¹⁴² 47 C.F.R. §§ 1.1220(e)(i) and 1.2110(e)(2).

¹⁴³ 47 C.F.R. § 1.2110(e)(4)(iii).

¹⁴⁴ See, *e.g.*, Letter to Michele C. Farquhar from Jay P. Urwitz, August 2, 1996.

¹⁴⁵ See Stephen R. Kruft *Cross-Default Provisions in Financing and Derivatives Transactions*, 113 Banking L.J. 216 (1996).

before licenses are issued or during the installment payment period, reduce the efficiency of the licensing process. A default, regardless of when it occurs, makes it necessary for the Commission to incur the costs of reauctioning the license, and the default delays the deployment or continuation of service in the affected market. We believe that imposing the default payment of Section 1.2104(g) on all defaulting licensees would serve to discourage defaults and encourage licensees to find private market solutions for default situations in addition to covering the cost the government must incur to reauction the license. We seek comment on this tentative conclusion and on the appropriate method for calculating default payments when defaults occur during the license term.

77. We seek comment on whether the Commission should cross default its installment payment plan loans with other installment payment plan loans to the same licensee. If adopted, should a cross default provision apply across services? For example, if a licensee, with both SMR and broadband PCS licenses, defaults on one of its PCS licenses, should the Commission consider pursuing default remedies against all PCS and SMR licenses? Instead, should we pursue default remedies against the single license only? What factors should influence our decision to pursue cross-defaults? Should cross-defaults be applied automatically or on a case-by-case basis? We also seek comment, in general, on what remedies are appropriate when licensees default.

E. Competitive Bidding Design, Procedure, and Timing Issues

1. "Real time" Bidding

78. Background. Congress has directed the Commission to "design and test multiple alternative methodologies for auction designs."¹⁴⁶ In the *Order* accompanying this *Notice*, we amend our general auction rules to specify a menu of auction designs that we can choose from.¹⁴⁷ These designs include: (1) simultaneous multiple round auctions, using remote and/or on-site electronic bidding; (2) sequential multiple round auctions, using either oral ascending or remote or on-site electronic bidding; and (3) sequential or simultaneous single round auctions, using either remote or on-site electronic bidding, or sealed bids. The simultaneous multiple round auction methodology with discrete rounds has been used in most auctions thus far because it provides bidders with valuable information regarding the value others place on licenses and allows bidders to pursue backup strategies as more information becomes available during the auction. The Commission is interested in reducing the length of the auction without sacrificing the economic efficiency of the assignment process.

79. Discussion. We seek comment, in general, on how we can speed our auctions (and in particular our simultaneous multiple round auctions). For example, how could our current procedural rules for simultaneous multiple round auctions be modified to meet this objective, or

¹⁴⁶ 47 U.S.C. § 309(j)(3).

¹⁴⁷ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373, ¶¶ 146-153.

what new designs might be used to efficiently allocate numerous licenses?

80. We believe that one way complex auctions of multiple licenses could proceed more quickly would be to modify our current simultaneous multiple round auction to allow bidding on a continuous basis within a combined bid submission/bid withdrawal period. This would give bidders immediate feedback on new high bids, withdrawn high bids and minimum accepted bids, and provide them with the opportunity to move the auction along more quickly. Under the current simultaneous multiple round auction rules, each round of bidding contains a discrete bid submission period and a bid withdrawal period. The rules permit bidders to place bids once within the submission period of the round on licenses that they are eligible to bid on, and they may withdraw high bids only during the bid withdrawal period. This requires bidders to wait until the end of the round to determine their status. An open, continuous bidding round -- in which bidders would know when their bid has been exceeded and would be free to bid again -- could reduce the delay inherent in our current design. Therefore, we propose to amend our general rules to provide for such "real time" bidding as another design feature for electronic multiple round auctions.

81. We recognize, however, that it may be difficult for bidders to react quickly enough to ensure that in each bidding round they make new high bids on the necessary percentage of their bidding eligibility to meet their activity requirement.¹⁴⁸ Therefore, we propose that after each fixed period of real time bidding (when only standing high bids from the previous round and new high bids from the current round count in determining the bidder's activity level) we would open a discrete closed bidding period, when bidders would be able to submit valid bids (bids that meet or exceed the minimum accepted bid) at the end of the "real time" bidding to ensure that they have the opportunity to meet their activity requirements for the round. Following the discrete closed bidding period, the Commission would post the final round results for the period and make all bids available to the public. By allowing a discrete period of time for bidders to make valid bids at the end of the round, we would reduce the risks associated with real time electronic bidding.

82. Because "real time" auctions are a variation of the simultaneous multiple round auction design established in our rules, we tentatively conclude that many of the same procedures should apply.¹⁴⁹ These include: upfront payments to determine eligibility, activity requirements that apply to each round, minimum bid increments, and a stopping rule. However, we believe that separate rules would be required on certain issues. We seek comment on issues that arise when the bid submission and bid withdrawal periods are combined, such as how withdrawn bids should be treated when calculating current activity. For example, whether a bid that is placed and withdrawn in one round should count as activity, and whether a withdrawn bid will negate the status of that bid as activity in the current round as well as the status as standing high bid.

¹⁴⁸ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2371, ¶¶ 133-37 (1994), for an explanation and description of the Commission's activity rules.

¹⁴⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2367-68, ¶¶ 116-21 (1994). See also *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, ¶¶ 24-26.

83. In addition, we seek comment on the appropriate length for the real time bidding rounds. We seek comment on what measures we can take to assure bidders that they will have enough time to determine their bidding strategies with "real time" bidding. In particular, we seek comment on the impact of "real time" bidding on small businesses, generally, and particularly on their ability to process bid information during the course of a single round.

2. Minimum Opening Bids

84. Background. Currently, Section 1.2104(d) of our rules states that the Commission may establish *suggested* minimum opening bids.¹⁵⁰ In the *Competitive Bidding Second Report and Order*, we noted that if only two or three applicants applied to bid for a valuable license, the Commission might set a reservation price.¹⁵¹ A reservation price is a price below which a license subject to auction will not be awarded.¹⁵² We provided the option of setting a reservation price in order to prevent a license from being awarded under circumstances where there would be little competition among bidders and significant incentives to collude.¹⁵³

85. Discussion. We propose to amend Section 1.2104 to specify that the Commission may establish minimum opening bids, rather than suggested minimum opening bids. Such a rule has been adopted in service-specific rules.¹⁵⁴ We propose to amend our general competitive bidding rules to allow us to establish a minimum opening bid because we believe that a minimum opening bid can serve some of the same purposes as a reservation price. A minimum opening bid increases the likelihood that the public receives fair market value for the spectrum being auctioned and can also help an auction move more swiftly. We seek comment on this proposal.

3. Maximum Bid Increments

86. Background. A bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round.¹⁵⁵ We determined in the *Competitive Bidding Second Report and Order* that the Commission would reserve the right to specify minimum bid increments in dollar terms as well as in percentage terms. We reasoned that imposing a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to

¹⁵⁰ 47 C.F.R. § 1.2104(d).

¹⁵¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384, ¶ 207.

¹⁵² 47 C.F.R. § 1.2104(c).

¹⁵³ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384, ¶ 207.

¹⁵⁴ See, e.g., 47 C.F.R. § 101.71 (DBS).

¹⁵⁵ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2369, ¶¶ 124-26.

closure within a reasonable period of time.¹⁵⁶ We did not reserve the discretion to specify maximum bid increments.

87. Discussion. Whereas the minimum bid increment speeds the auction process, a maximum bid increment could prevent bidders from placing bids that are significantly higher than the minimum acceptable bid. This type of bidding is known as "jump bidding." Some theoretical literature suggests that bidders could use jump bidding to manipulate the auction process and potentially reduce efficiency of the auction.¹⁵⁷ Jump bidding complicates bidding strategy and denies bidders information about the number of bidders who would be willing to pay prices between the minimum acceptable bid and the jump bid. In the absence of information about the bidders who would be willing to participate at intermediate bids, other bidders might feel compelled to shade their bids more than they otherwise would. This behavior is an attempt to avoid the "winner's curse," -- the phenomenon of a bidder winning only because he or she has overestimated the value of the license. A general principle of auction theory has it that the auction mechanisms which perform the best are those which are able to induce bidders to reveal the most information. To the extent that jump bids enable bidders to conceal information, the phenomenon moves us away from the informational advantages of an ascending bid (multiple round) auction in the direction of a first-price sealed bid (single round) auction. We seek comment on whether the Commission should retain the discretion to employ a maximum bid increment if it finds that jump bidding is impairing the auction process.

4. Bid Withdrawal Payments

88. Background. Under our current rules, if a high bid is withdrawn prior to the close of a simultaneous multiple round auction, the Commission will impose a payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. If a winning bidder defaults after the close of an auction, the defaulting bidder will be required to pay the foregoing payment plus an additional payment of 3 percent of the subsequent winning bid or its own withdrawn bid, whichever is lower.¹⁵⁸

89. To help bidders avoid mistaken bids that could expose them to liability for bid withdrawal payments, the Commission has enhanced its electronic bidding software. The software now displays a warning screen to bidders when they try to place a bid that is far in excess of the minimum accepted bid. Bidders must affirmatively override this mistaken bid warning if they wish to place the bid. For example, if the minimum accepted bid for a license is

¹⁵⁶ *Id.*

¹⁵⁷ Lawrence M. Ausubel, "Open-Outcry Auctions for FCC Licenses," Comments for MCI Telecommunications Corp. in IB Docket No. 95-168, PP Docket No. 93-253 (Nov. 17, 1995) (citing Christopher Avery, "Strategic Jump Bidding in English Auctions," Working Paper, Kennedy School of Government, Harvard University, Mar. 15, 1994).

¹⁵⁸ 47 C.F.R. § 1.2104(g).

\$10,000, an excessive bid warning will appear if a bidder attempts to place a bid of \$100,000 or more.

90. Discussion. When we adopted our provisions governing bid withdrawals, we determined that these rules would discourage insincere bidding without causing bidders to be too cautious in attempting to aggregate licenses.¹⁵⁹ We have also recently addressed the issue of how our bid withdrawal payment rules apply to bids that are mistakenly placed and subsequently withdrawn.¹⁶⁰ In *Atlanta Trunking*, we stated that, while we believe that in some cases full application of the bid withdrawal payment provisions could impose an extreme and unnecessary hardship on bidders, it may be extremely difficult for the Commission to distinguish between "honest" erroneous bids and "strategic" erroneous bids. We held that in cases of erroneous bids, some relief from the bid withdrawal payment requirement appears necessary. Thus, we waived our bid withdrawal rules as they apply to 900 MHz SMR and broadband PCS and applied the following guidelines: If at any point during an auction a mistaken bid is withdrawn in the same round in which it was submitted, the bid withdrawal payment should be the greater of (a) the minimum bid increment for that license and round, or (b) the standard bid withdrawal payment calculated as if the bidder had made a bid at the minimum accepted bid. If a mistaken bid is withdrawn in the round immediately following the round in which it was submitted, and the auction is in Stage I or Stage II, the withdrawal payment should be the greater of (a) two times the minimum bid increment during the round in which the mistaken bid was submitted or (b) the standard withdrawal payment calculated as if the bidder had made a bid at one bid increment above the minimum accepted bid. If the mistaken bid is withdrawn two or more rounds following the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment. Similarly, during Stage III of an auction, if a mistaken bid is not withdrawn during the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment.

91. In response to a commenter's request, we recently modified the broadband PCS rules for the D, E, and F blocks to establish provisions governing the withdrawal of erroneous bids.¹⁶¹ We thus incorporated the guidelines fashioned in *Atlanta Trunking* into these rules.¹⁶² We determined that under this approach, the required bid withdrawal payment would be substantial enough to discourage strategic placement of erroneous bids without being disproportionately punitive. We now propose to change Sections 1.2104 and 1.2109 of our rules such that similar provisions adopted for the broadband PCS D, E, and F block auction will apply to all auctions.

¹⁵⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74, ¶¶ 146-153.

See *Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions*, Order, FCC 96-203 (May 3, 1996) ("*Atlanta Trunking*"), *recon. pending*. See also *Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision*, Order, DA 96-706 (May 6, 1996), *app. rev. pending*.

¹⁶¹ *D, E, F Block Report and Order*, 11 FCC Rcd at 7896, ¶¶ 152-54.

¹⁶² *Id.*

We seek comment on this proposal.

5. Misuse of Bid Withdrawals

92. The current auction rules allow a high bidder on a license to withdraw its bid at any point during the auction, subject to a bid withdrawal payment.¹⁶³ We have recognized that allowing bid withdrawals facilitates efficient aggregation of licenses and pursuit of efficient backup strategies as information becomes available during the course of an auction. We also are cognizant that allowing withdrawals also risks encouraging insincere bidding and allowing the use of withdrawals for anti-competitive strategic purposes, such as signaling other bidders.¹⁶⁴ To guard against such abuses, the Commission put in place a withdrawal payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. We seek comment on whether we should exercise our authority to limit withdrawals, and if so, under what circumstances. Should we consider limiting the number of withdrawals that a bidder is permitted to make in an auction, the number of rounds in which withdrawals can be made, or the number of withdrawals permitted with respect to a particular license? Are there other ways to address our concern about strategic withdrawals without unduly affecting bidders' ability to efficiently aggregate licenses? For example, should we consider increasing the withdrawal payment or changing its structure?

6. Reauction Versus Offering to Second Highest Bidder

93. Background. Under Section 1.2109(b) of our rules, if a winning bidder withdraws its bid after the auction has closed or fails to remit the required down payment within the requisite period after the Commission has announced high bidders, the bidder will be deemed to have defaulted. This rule also provides that, in such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.¹⁶⁵ In the *Order* accompanying this *Notice*, we modified the down payment due date to ten business days after the Commission has issued a Public Notice announcing winning bidders, and accordingly adjusted the period within which the Commission has discretion to offer the defaulted license to bidders in the original auction to the same ten-day period.¹⁶⁶

94. Discussion. When we first adopted rules governing the licensing of defaulted licenses, we stated that "[i]n the event that a winning bidder in a simultaneous multiple round auction defaults on its down payment obligations, the Commission will generally re-auction the license

¹⁶³ 47 C.F.R. § 1.2104(g)

¹⁶⁴ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74, ¶¶ 146-153.

¹⁶⁵ 47 C.F.R. § 1.2109(b). If a winning bidder defaults on a license or is disqualified after having made the required down payment, the Commission will conduct another auction for the license, affording new parties and opportunity to file applications. *Id.*

¹⁶⁶ See *supra* at ¶ 14.

either to existing or new applicants."¹⁶⁷ Noting that in some circumstances the costs of conducting a re-auction may not always be justified, we reserved the discretion in cases in which the winning bidder defaults on its down payment obligation to offer a defaulted license to the highest losing bidders (in descending order of their bids) at their final bids if "only a small number of relatively low value licenses are to be re-auctioned" ¹⁶⁸

95. Having now developed a computerized auction system and conducted numerous auctions, we believe that the costs of a re-auction, even for a small number of relatively low value licenses, would be minimal. Use of regularly scheduled quarterly auctions will also ensure rapid reauction. Further, re-offering a defaulted license to the next highest bidder (in descending order) at their final bids may not ensure that the license will be awarded to the bidder that values it the most highly. When more than one license is being auctioned, aggregation strategies may shift during the course of the auction, affecting interest of individual bidders.

96. We ask commenters to address whether the Commission should (1) retain Section 1.2109(b) in its current form, (2) modify the rule so that the Commission retains the discretion regardless of when a default occurs to offer the license only to the second highest bidder at its bid price (3) modify the rule so that the Commission retains discretion to offer a license on which the winning bidder has defaulted on its down payment obligation only to the second highest bidder, (4) modify the rule so that the Commission retains discretion to offer a defaulted license to the highest losing bidders (in descending order of their bids), but only at the final bid level of the second highest bidder, (5) modify the rule to require re-auction of defaulted licenses regardless of when a default occurs. Moreover, we seek comment on whether we should modify the rule to codify our statement in the *Competitive Bidding Fifth Report and Order* that where there are a relatively small number of low value licenses, and only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidder because the cost of conducting another auction may exceed the benefits.¹⁶⁹ Commenters favoring this should indicate the parameters that the Commission should employ in determining which licenses might be re-offered to bidders in the original auction.

F. Rules Prohibiting Collusion

97. Background. We adopted rules to prohibit collusion in the *Competitive Bidding Second Report and Order* because we were concerned that collusive conduct by bidders prior to or during an auction could undermine the competitiveness of the bidding process and prevent the formation of a competitive post-auction market structure.¹⁷⁰ In general, bidders are required to

¹⁶⁷ *Competitive Bidding Second Report and Order* , 9 FCC Rcd at 2374, ¶ 154 n.115.

¹⁶⁸ *Id.*

¹⁶⁹ *Competitive Bidding Fifth Report and Order* , 9 FCC Rcd at 5537, n. 55.

¹⁷⁰ *Competitive Bidding Second Report and Order* , 9 FCC Rcd at 2387, ¶ 225.

identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. With certain exceptions, all such arrangements must have been entered into prior to the filing of short-form applications. After such applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.¹⁷¹

98. As our auction process has evolved, we have clarified the rules prohibiting collusion. Early on in the auction process, for example, we established exceptions to the anti-collusion rules in an attempt to allow applicants greater flexibility to form agreements with other applicants and thereby acquire the capital necessary to bid successfully for licenses.¹⁷² Specifically, we amended the anti-collusion rules to permit a holder of a non-controlling attributable interest in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area, provided that the attributable interest holder certifies to the Commission that it has not communicated and will not communicate with the applicant or any one else information concerning the bids or bidding strategies (including which licenses an applicant will or will not bid on) of more than one applicant for licenses in the same geographic area in which it holds an ownership interest or with which it has a consortium arrangement.¹⁷³ Additionally, Commission staff has issued public notices and letters that seek to interpret and clarify these rules.¹⁷⁴

99. Discussion. The exception outlined above was adopted in order to facilitate the flow of capital to applicants by enabling parties to make investments in multiple applicants for licenses in the same geographic license areas.¹⁷⁵ Having gained experience with implementing our anti-collusion rules, we now believe that this exception is difficult to apply in a business setting. Entities are reluctant to invest in multiple applicants if they cannot obtain information about business plans and strategies, which often necessarily reflect bidding strategies or bids.

¹⁷¹ 47 C.F.R. § 1.2105(c)(1).

¹⁷² See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7684 at 7687-89 ¶¶ 8-12 (1994) ("*Collusion MO&O*").

¹⁷³ 47 C.F.R. § 1.2105(c)(4). See also *Collusion MO&O*, 9 FCC Rcd at 7688-89, ¶ 11.

¹⁷⁴ See *Public Notice*, "FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reauction," DA 96-929 (June 10, 1996); *Public Notice*, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," DA 95-2244 (Oct. 26, 1995); *News Release*, "Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS Auctions" (Oct. 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, Oct. 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, Apr. 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996.

¹⁷⁵ *Collusion MO&O*, 9 FCC Rcd at 7689, ¶ 12.

100. We therefore propose to modify this provision of the anti-collusion rule to permit entities to invest in multiple applicants if the original applicant withdraws from the auction. Under our proposal, a holder of a non-controlling attributable interest in an applicant would be permitted to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area, provided that the original applicant has dropped out of the auction and is no longer placing bids, and the attributable interest holder certifies to the Commission that it did not communicate with the new applicant prior to the date that the original applicant withdrew from the auction. We believe that this proposal will encourage entities to invest in bidders if their original applicant fails to complete the auction and will give such entities the flexibility needed to do so. Furthermore, we believe that prohibiting any communication with other applicants prior to when the original applicant withdraws from the auction will prevent investors from exerting pressure on smaller bidders to withdraw in exchange for teaming up with other larger bidders. We seek comment on this proposal.

101. In the proceeding involving service-specific auction rules for paging services, several commenters requested that we establish rules that do not have a chilling effect on ongoing business acquisitions and transactions. Under the current rules, they contended, discussions between bidders for the same license area regarding a business merger or acquisition may be construed as discussions of bidding or bidding strategy -- thus violating the anti-collusion rules. They proposed that we grant a "safe harbor" for certain situations, such as in services where there are incumbent operators, permitting ongoing discussions among bidders concerning mergers, acquisitions or intercarrier arrangements to proceed during the period in which the anti-collusion rules are applicable.¹⁷⁶ Some suggested a system in which respective bidder personnel certify that persons involved in such discussions are not discussing bidding strategy or otherwise divulging bidder information to each other in violation of the anti-collusion rules. Absent a showing that a certification is false, necessary discussions in the ordinary course of business would be permitted during the course of the auction. We seek comment on this proposal concerning a safe harbor for discussions of certain non-auction business matters and we seek comment on any other changes to our rules prohibiting collusion they believe are warranted. Finally, we seek comment on the public notices and letters issued by Commission staff seeking to interpret and clarify these rules.

G. Pre-grant Construction

102. Background. In 1989, we adopted rules permitting certain license applicants, under prescribed conditions, to construct their facilities prior to license grant.¹⁷⁷ We subsequently

¹⁷⁶ See AirTouch Comments at 37-40 and Arch Comments at 19-20 filed in Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act --Competitive Bidding Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-18; PP Docket No. 93-253 (February 24, 1997). See also MobileMedia Comments at 26 and Metrocall Comments at 21-22 filed in the same proceeding.

¹⁷⁷ See Amendment of Part 22 of the Commission's Rules to Allow Public Mobile Service Applicants to Commence Construction After Filing FCC Form 401, But Prior to Receiving an Authorization, *Report and Order*, 4 FCC Rcd 5960 (1989) (rules applied to the Domestic Public Cellular Radio Telecommunications Service and the Public Land Mobile Service); Amendment of Part 22 of the Commission's Rules to Allow Public Mobile Service Applicants to Commence

determined that Part 22 and Part 90 commercial mobile radio service applicants should be subject to the same rules governing the construction of facilities prior to the grant of pending applications.¹⁷⁸ We later clarified that such rules would extend to successful broadband PCS bidders that had filed a long-form application.¹⁷⁹ Thus, 35 days after the date of the Public Notice announcing the broadband PCS A and B Block Form 600 applications accepted for filing, the parties has filed those applications were permitted, at their own risk, to commence construction of facilities, provided that (1) no petitions to deny the application had been filed; (2) the application did not contain a request for a rule waiver; (3) the applicant complied fully with the antenna structure provisions of Sections 24.416 and 24.816 of the Commission's rules, including FAA notification, and Commission filing requirements; (4) the application indicated that the facilities would not have a significant environmental effect (*see* 47 C.F.R. §§ 24.413(f) and 24.813(f)); and (5) international coordination of the facilities was not required.¹⁸⁰

103. Discussion. We propose to extend the pre-grant construction rules set forth in 47 C.F.R. § 22.143 to all auction winners, regardless of whether petitions to deny have been filed against their long-form applications. We further propose to permit each auction winner to begin construction of its system, at its own risk, upon release of a Public Notice announcing the acceptance for filing of post-auction long-form applications. We tentatively conclude that to do so would further the public interest by expediting, in most cases, the initiation of service to the public. We believe that allowing pre-grant construction furthers the statutory objective expressed in the Communications Act in Section 309(j)(3)(A) of the rapid deployment of new technologies, products, and services for the benefit of the public. Pre-grant construction would be subject to any service-related restrictions, including but not limited to antenna restrictions, environmental requirements, and international restrictions. Finally, we emphasize that any applicant engaging in pre-grant construction activity would do so entirely at its own risk, and the Commission would not take such activity into account in ruling on any petition to deny although we acknowledge that this could result in significant economic loss to applicants. We seek comment on this proposal.

IV. CONCLUSION

104. Based on the experience we have gained from our completed auctions, we believe the time has come to streamline our competitive bidding rules in order to make our licensing

Construction After Filing FCC Form 401, But Prior to Receiving An Authorization, *Memorandum Opinion and Order*, 5 FCC Rcd 6182 (1990)(expanding rules to all Public Mobile Service applicants). The provision was originally codified at 47 C.F.R. § 22.43(d) and now as amended appears at 47 C.F.R. § 22.143.

¹⁷⁸ Implementation of Sections 3(n) and 332 of the Communications Act, *Third Report and Order*, 9 FCC Rcd 7988, 8153 (1994).

¹⁷⁹ *See Public Notice*, "Personal Communications Service Information, Broadband" Report No. CW-95-02 (released Apr. 12, 1995).

¹⁸⁰ *Id.*

process more efficient. In the past, we have adjusted our auction procedures for different services as we gained experience with the process, and the result is that we have different procedures for different auctionable services. We believe that these rules should be simplified and made uniform wherever possible. Moreover, we do not believe that it is necessary to continue the time-consuming process of conducting rule making proceedings prior to each auction. The *Order* amends Subpart Q of Part 1 of the Commission's rules to reflect procedural changes, including some that have already been made in certain service-specific rules, that we believe would benefit bidders and the auction process generally. In the *Notice of Proposed Rule Making*, we propose changes to our general competitive bidding rules that are intended to simplify our regulations and eliminate unnecessary rules wherever possible. At the same time, we believe these rules will be beneficial in providing more specific guidance on a number of issues to auction participants, while also giving them more flexibility, and increase the effectiveness of our auctions.

V. PROCEDURAL MATTERS AND ORDERING CLAUSES

105. The Initial Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act, is set forth in Appendix C. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

106. IT IS ORDERED that the rule changes specified in Appendix B ARE ADOPTED and are EFFECTIVE 30 days after publication in the Federal Register.

107. IT IS FURTHER ORDERED that the petitions for reconsideration of the *Competitive Bidding Fifth Memorandum Opinion and Order*, to the extent that they are addressed herein, ARE DENIED.

108. Ex Parte Presentations. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

109. Authority. This action is taken pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309 (j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j).

110. Comment. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **March 27, 1997**, and reply comments on or before **April 16, 1997**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten comments must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission,

Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

111. Additional Information. For further information concerning this rule making proceeding contact Mark Bollinger at (202) 418-0660, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

The following is a list of the competitive bidding procedures that have been adopted in specific services but are not included in the Part 1 rules. As stated in paragraph 17, we invite comment on whether any of these provisions should be incorporated in our general competitive bidding rules.

A. The following rule sections establish a period after the filing of long-form applications during which other parties may petition to deny the grant of licenses to auction winners:

- MDS: Sec. 21.925(d)
- Broadband PCS: Sec. 24.827(b)
- Narrowband PCS: Sec. 24.427(b)
- WCS: Sec. 27.207

B. The following rule sections sets forth Form 600 amendment procedures:

- MDS: Sec 21.926
- WCS: Sec. 27.313

C. The following rule sections indicate what supplemental information an applicant must include with its Form 600:

- MDS: Sec. 21.956
- Broadband PCS: Sec. 24.707
- WCS: Secs. 27.206 and 27.307

D. The following rule sections require bidders to attach an environmental impact statement to the Form 600 if granting the application may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, and impose a continuing duty on licensees to monitor the environmental impact of subsequent construction.

- Narrowband PCS: Sec. 24.413(f)
- Broadband PCS: Sec. 24.813(f)
- WCS: Sec. 27.307

E. The following rule sections affect the amount and due date of down payments owed by

winning bidders:

- DBS: Sec. 100.76(b)
- Broadband PCS: Sec. 24.711(a)(2)
- WCS: Sec. 27.206

F. The following rule sections permit voluntary dismissal and return of applications:

- Narrowband PCS: Sec. 24.428(a)
- Broadband PCS: Sec. 24.828(a)
- WCS: Sec. 27.317(a)

G. The following rule sections describe procedures for amendments to short-form applications:

- Narrowband PCS: Sec. 24.422
- Broadband PCS: Sec. 24.822
- WCS: Sec. 27.204

H. Narrowband PCS rule section 24.420 describes defective applications and how the Commission treats them.

I. Broadband PCS rule section 24.806(d) indicates where applicants should send correspondence regarding their applications.

J. The following rule sections set forth procedures to be followed when mutually exclusive applications have not been filed for a particular license:

- MDS: Sec. 21.927
- Narrowband PCS: Sec. 24.409(b)
- Broadband PCS: Sec. 24.809(b) and Sec. 24.826(a)
- WCS: Sec. 27.321

K. The following rule sections delineate the contents of pre-auction public notices:

- MDS: Sec. 21.952(b)
- Narrowband PCS: Sec. 24.305
- Broadband PCS: Sec. 24.705
- WCS: Sec. 27.204

L. The following rules describe the procedure to follow when tie bidding occurs:

- DBS: Sec. 21.926
- WCS: Sec. 27.202

M. The following rule sections establish minimum activity requirements and allow for activity waivers:

- DBS: Sec. 100.73(e)
- Broadband PCS: Sec. 24.703(f)

N. The following rule sections establish bid withdrawal payments for various auction types:

- MDS: Sec. 21.959(b)
- Narrowband PCS: Sec. 24.304(c) and (d)
- DBS: Sec. 100.74(d)
- WCS: Sec. 27.203

O. The following rules describe procedures for determining unjust enrichment payments:

- MDS: Sec. 21.926
- WCS: Sec. 27.209(d)

P. The following rule sections require audits of bidders who participate in auctions as designated entities:

- MDS: Sec. 21.960(g)
- SMR: Sec. 90.815(d)

Q. The following rule sections require disclosures to be made by designated entities on short-form applications and Form 600s:

- Narrowband PCS: Sec. 24.309(c)
- SMR: Sec. 90.815(b)(3)
- WCS: Sec. 27.204(a)(2)(iv)

R. SMR rule section 90.815(c) requires small business winners to maintain certain records at their principal place of business.

S. The following rule sections establish definitions of "small business" and "consortium of small businesses."

- Narrowband PCS: Sec. 24.320(b)
- SMR: Sec. 90.814(b)
- Broadband PCS: Sec. 24.720(b)
- WCS: Sec. 27.201(b)

T. The following rule sections establish definitions of women- and minority-owned businesses:

- Narrowband PCS: Sec. 24.320(c)
- Broadband PCS: Sec.24.720(c)

U. The following rule sections establish control group definitions:

- Narrowband PCS: Sec. 24.320(h)
- Broadband PCS: Sec. 24.720(k)

V. The following rule sections establish other miscellaneous definitions:

- Narrowband PCS rule Sec. 24.320(g) defines passive equity.
- SMR rules set forth definitions for the following terms:
 1. Sec. 90.814(g): attributable interests
 2. Sec. 90.814(g)(1): multiplier

●Broadband PCS rules set forth definitions for the following terms:

1. Sec. 24.720(h): institutional investor
2. Sec. 24.720(j): nonattributable equity
3. Sec. 24.720(l): affiliate
4. Sec. 24.720(m): publicly traded corporation with widely dispersed voting power.
5. Sec. 24.720(n): qualifying investor; qualifying minority and/or woman investor
6. Sec. 24.720(o): preexisting entity; existing investor.

●WCS rules set forth definitions for the following terms:

1. Sec. 27.210(c): gross revenues
2. Sec. 27.210(d): affiliate

W. Narrowband PCS rule section 24.406(e) and WCS rule section 27.304 establish procedures for applicants to follow when submitting application materials to the Commission.

X. DBS rule section 100.80 sets forth a disclosure procedure in the event of a license transfer.

Y. Broadband PCS rule section 24.710 establishes license acquisition limitations for the C and F block auctions.

APPENDIX B

RULE CHANGES

Part 1 of Chapter I of Title 47 of the Code of Federal Regulation is amended as follows:

PART 1 - GENERAL PROCEDURES

1. The authority citation for Part 1 continues to read as follows:
2. Section 1.2103 (a) and (b) are amended to read as follows:

Sec. 1.2103 Competitive bidding design options.

(a) The Commission will select the competitive bidding design(s) to be used in auctioning particular licenses or classes of licenses on a service-specific basis. The choice of competitive bidding design will generally be made pursuant to the criteria set forth in PP Docket No. 93-253, FCC 94-61, adopted March 8, 1994, available for purchase from the International Transcription Service, Inc., 2100 M St. NW, suite 140, Washington, DC 20037, telephone (202) 857-3800, but the Commission may design and test alternative methodologies. The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:

- (1) Simultaneous multiple round auctions (using remote and/or on-site electronic bidding);
- (2) Sequential multiple round auctions (using either oral ascending or remote and/or on-site electronic bidding);
- (3) Sequential or simultaneous single round auctions (using either sealed paper or remote and/or on-site electronic bidding).

(b) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses or authorizations, in addition to bids on individual licenses or authorizations. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction. The Commission may also allow bidders to submit contingent bids on individual and/or combinations of licenses.

* * * * *

3. Section 1.2105 is amended by revising paragraph (a)(2) to read as follows:

Sec. 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) * * *

(2) The Form 175 must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons;

(iii) The identity of the person(s) authorized to make or withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to Sec. 1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under Sec. 1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) of this section regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid;

(x) Certification that the applicant is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency.

* * * * *

4. Section 1.2106 is amended by revising paragraph (b) to read as follows:

Section 1.2106 Submission of upfront payments.

* * * * *

(b) Upfront payments must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

* * * * *

5. Section 1.2107 is amended to by revising paragraphs (b) and (c) to read as follows:

Sec. 1.2107 Submission of down payment and filing of long-form applications.

* * * * *

(b) Within ten (10) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under Sec. 1.2103, however, bidders may be required to submit their down payments with their bids.) This down payment must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Winning bidders who are qualified designated entities eligible for installment payments under Sec. 1.2110(d) are only required to bring their total deposits up to ten (10) percent of their winning bid(s). Such designated entities must pay the remainder of the twenty (20) percent down payment within ten (10) business days of grant of their application. See Sec. 1.2110(e) (1) and (2). Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to the bidders.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder (unless it has already submitted such an application, as contemplated by Sec. 1.2105(a)(1)(b)). Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Specific procedures for filing electronically and manually filed applications will be set out by Public Notice. While Form 600 may be filed either electronically or manually, beginning January 1, 1998, all applications must be filed electronically. Those applicants who file applications manually must also include a copy of all attachments and any other supporting documents on a 3.5 inch diskette in separate ASCII text (.TXT) file formats. An applicant that fails to submit the required long-form

application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in Sec. 1.2104.

* * * * *

6. Section 1.2109 is amended by revising paragraphs (a) and (b) to read as follows:

Sec. 1.2109 License grant, denial, default, and disqualification.

(a) Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in Sec. 1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in Sec. 1.2107(b) will apply.

* * * * *

7. Section 1.2110 is amended by revising paras (b)(2), (e)(1), (e)(2), and (e)(3) to read as follows:

* * * * *

Sec. 1.2110 Designated entities.

* * * * *

(b) * * *

* * * * *

(2) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100

percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. Members of minority groups include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

* * * * *

(e) * * *

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in Sec. 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to Sec. 1.2104(g)(2).

(2) Within ten (10) business days of the grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay default payments pursuant to Sec. 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

* * * * *

Appendix C

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact the policy and regulatory changes in this Notice of Proposed Rule Making, WT Docket No. 97-82, will have on small entities. Written public comments are requested on this IRFA. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines provided above. The Secretary shall send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the U.S. Small Business Administration in accordance with 5 U.S.C. § 603(a).

A. Reason for Action:

The Commission seeks to amend its general competitive bidding rules under the authority of Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), which delegates authority to the Commission to use auctions to select among mutually exclusive initial applications in certain services. These alterations are based on the Commission's experience gained over the course of 12 spectrum auctions, and are designed to provide clarity, ease of administration, and greater fairness to auctions.

B. Objectives:

This NPRM seeks to establish standardized rules for auctions in lieu of the time consuming and administratively burdensome practice of drafting service-specific auction rules. In drafting these proposed rules, the Commission has evaluated the procedures applied in the previous 12 spectrum auctions and has determined that certain changes to the existing general auction rules are necessary to ensure administrative ease, fairness, and flexibility in auctions. The proposed rules would amend Subpart Q of Part 1 of the Commission's rules to reflect procedural changes, including some that have already been proposed and implemented in prior auctions, that the Commission believes would benefit bidders and the auction process generally. The NPRM proposes changes to the general competitive bidding rules that are intended to simplify the regulations and eliminate unnecessary rules wherever possible.

C. Legal Basis:

The proposed action is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 6002, and Sections 2(a), 3(n), 4(j), 302, 303(g), 303(r), 309(i), 309(j), 332(a), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. 152(a), 153(n), 154(i), 302, 303(g), (303(r), 309(i), 309(j), 332(a), 332(c) and 332(d), as amended.

D. Description of Projected Reporting, Record Keeping and Other Compliance Requirements:

The proposed rules under consideration in this NPRM include the possibility of altered reporting and record keeping requirements for a number of small business entities. Specifically, the NPRM seeks to define major amendments to its FCC Form 175 applications to better inform auction applicants of the type of information which may not be altered after the submission of this application. Additionally, the NPRM proposes to require a uniform FCC Form 600 application to be completed by auction winners. The NPRM also proposes to streamline the Commission's ownership disclosure requirements to allow applicants and licensees who have already filed ownership disclosure forms to incorporate this information on subsequent applications. This alteration will allow for greater ease in applying for spectrum auctions and prevent duplicative filings by auction applicants.

E. Description and Estimate of the Number of Small Entities to Which The Rule Will Apply:

The proposed changes in the competitive bidding rules would affect a number of small entities. There are three ways to define small entities that may be applicable for these proposed rules: 1) SBA's size standards under the SBA's standard industrial code, 13 C.F.R. § 121.201; 2) the Small Business Act's definition of small entities under 15 U.S.C. § 632(a); and 3) the Commission's refined definition of designated entities for the purposes of competitive bidding.

The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction" and "the same meaning as the term 'small business concern' under the Small Business Act unless the Commission has developed one or more definitions that are appropriate for its activities."¹⁸¹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁸²

Wireless Providers

We apply the definition of a small entity that will provide wireless services under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing fewer than 1,500 persons.¹⁸³ The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Bureau of the Census' 1992 study indicates that only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or

¹⁸¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁸² Small Business Act, 15 U.S.C. § 632 (1996).

13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

more employees -- and these may or may not be small entities, depending on whether they employed more or less than 1,500 employees.¹⁸⁴ But 1,166 radiotelephone firms had fewer than 1,000 employees and therefore, under the SBA definition, are small entities. However, we do not know how many of these 1,166 firms are likely to be involved in future auctions.

The Commission will continue to formulate its small business definitions on a service-by-service basis. In creating these definitions, however, the proposed item seeks to apply a uniform definition of "gross revenues" which will include all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175).

Given the uncertain number of auctions to be held in the future, the Commission is unable to estimate how many small businesses under any one of the above three definitions would be effected by the proposed changes to the general competitive bidding rules.

Rural Telephone Companies

Neither the Commission nor the SBA has developed a definition for small providers of local exchange services (LECs) located in rural areas.¹⁸⁵ The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies.¹⁸⁶ The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.¹⁸⁷ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small rural incumbent LECs. We seek comment on the number of rural telcos that may be affected by these proposed rules.

U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC Code 4812 (issued May 1995).

¹⁸⁵ The Commission does not collect data on the number of rural telephone companies. Therefore, we include information about incumbent LECs generally.

¹⁸⁶ 13 C.F.R. § 121.201, SIC Code 4813.

¹⁸⁷ Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 1 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Dec. 1996) (*TRS Worksheet*).

Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."¹⁸⁸ Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs.¹⁸⁹ Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."

F. Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

G. Significant Alternatives Minimizing the Significant Economic Impact on Small Entities Consistent with the Stated Objectives:

The Notice of Proposed Rule Making seeks comment on changes to the Commission's auction rules that benefit "designated entity" applicants, a classification that includes some small businesses. Specifically, the NPRM proposes to adopt a uniform definition of "gross revenues" which will be used in future small business size calculations, and alter its definition of attributable investor to which focuses on *de jure* and *de facto* control, rather than the complicated control group equity structure used in previous rule making.

The NPRM seeks comment on usefulness and administrative viability of installment payments as a means of aiding small businesses and other designated entities. If, after receipt of comments, the Commission decides to continue its use of installment payments, the NPRM sets forth a tiered schedule of installment payment terms and interest rates to be used in future auctions. Similarly, the NPRM proposes to adopt a uniform schedule of bidding credits providing for a 25 percent bidding credit for very small businesses with average annual gross revenues not exceeding \$3 million, a 15 percent bidding credit for businesses with average annual gross revenues not exceeding \$15 million, and a 10 percent bidding credit for businesses with average annual gross revenues not exceeding \$40 million. To ensure that only qualified licensees avail themselves of the benefits afforded to designated entities, the NPRM proposes that future auctions use the broadband PCS unjust enrichment provisions to address assignment and transfers between designated entities and non-eligible entities or those entities who qualify for differing tiers of installment payments or bidding credits.

The NPRM considers several changes to payment procedures which may effect small businesses. With regard to upfront payments, the proposed item seeks comment on whether the

¹⁸⁸ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996), *motion for stay of the FCC's rules pending judicial review denied*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order, 11 FCC Rcd 11754 (1996), *partial stay granted*, *Iowa Utilities Board v. FCC*, No. 96-3321, 1996 WL 589204 (8th Cir. 1996) at ¶¶ 1328-1330 and 1342.

¹⁸⁹ See *id.* ¶ 1342.

Commission's current practice of returning the upfront payments of bidders who have completely withdrawn prior to the conclusion of competitive bidding is in the public interest. The NPRM further proposes to allow winning bidders to make their final payments or second down payment within a short period after the applicable deadline, provided that they also pay a late fee. The NPRM also seeks comment on whether auction winners faced with petitions to deny should be required to make their second down payments at the same time as all auction winners, or whether the deadline for this payment should be tolled during the processing of the petition to deny.

In the case of bidder withdrawal, default, disqualification, the NPRM proposes to continue the Commission's current practice of applying all funds that the bidder has on deposit to the bid withdrawal and default payments owed to the Commission. Where the default payment cannot be determined at the time of default, the NPRM proposes to require a defaulting bidder to pay a deposit of at least three percent of the defaulting winner's bid which is held by the Commission until the final default payment can be established.

For those licensees who avail themselves of installment payment provisions, the NPRM proposes to adopt a one time late payment fee equal to 5 percent for each installment payment submitted late. Under the proposed rules, licensees who do not make an installment payment within 90 days of its due date will automatically receive an additional 90 days to make that payment subject to a late payment fee of 15 percent the total amount of the late payments. Finally, the NPRM would extend the default payment provision defined in Section 1.2104(g), *i.e.*, the difference between the defaulting winner's bid and the subsequent winning bid plus 3 percent of the lesser of these amounts, to licensees who default on their installment payments.